92-857
No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CARVEL GORDON DILLARD,
Petitioner

versus

SECURITY PACIFIC CORP.;
MERRILL LYNCH, PIERCE FENNER & SMITH, INC.;
SECURITIES INDUSTRY ASSOCIATION, INC.;
SECURITY PACIFIC BROKERS, INC.;
FINANCIAL CLEARING & SERVICES CORPORATION;
JENKINS & GILCHRIST (A PARTNERSHIP); and
JENKINS & GILCHRIST (A PROFESSIONAL CORP.)
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED:

1. Whether this court should overturn the appeals court's ruling that illegal denial of the fundamental constitutional right to judicial trial and to trial by jury is properly remedied by award of economic damages only and that there is no right to demand specific performance.

2. Whether this court should overturn the appeals court's ruling that the arbitration contract is still binding and enforceable even if it is proven that it was an adhesion demand compelled by the duress of an illegal monopolistic restraint of trade.

3. Whether this court should enjoin defendants and their co-conspirators from uniformly adopting and agreeing to use, and in using exclusively, margin and option account contracts which contain provisions for the determination of all claims and controversies arising under said contracts in arbitration.

4. Whether this court should find that the appeals court made error by allowing the district court to ignore requests under F.R.C.P. 52 for findings of fact and conclusions of law concerning injunction and issue of illegal arbitration contract.

5. Whether this court should declare it to be an abuse of discretion in violation of F.R.C.P. 8 (f) to consolidate the three actions and then for the appeals court to declare that for some but not all purposes of the mandate the appeals court was pretending that it was ignorant of the related actions instead of considering the three actions as a whole.

6. Whether it is error that the appeals court ruled that although Dillard pleaded that he had been falsely arrested and imprisoned for illegal ulterior motives such facts, if proven to be true, created no violation of his civil rights under Title 42.

7. Whether it is error that the appeals court refused to review the district court's ruling that there was no private right of action under the Hobbs Act, 18 U.S.C. Section 1951 and it's ruling that there is no private right of action under the RICO Act, 18 U.S.C. Section 1961 et seq. for a violation of the Hobbs Act.

8. Whether it is error that the appeals court ruled that there is no private right of action under Section 17(a) of the Securities Act of 1933.

9. Whether incorrect or misleading statements in the appeals court's statement of the facts should be corrected by this court.

10. Whether the record of these actions shows that the court of appeals has ignored the district courts departure from the accepted and usual course of judicial proceedings in so far a manner as to call for an exercise of this court's power of supervision.
Shall this court affirm the rule of law by reviewing this petition or shall this court ratify the rule of men by allowing the lower courts to arbitrarily ignore the obvious?
The district court at Houston often ignores the obvious in order to suppress pro se litigation. The precise allegations which would compel trial of the legality of the arbitration clause that the Fifth Circuit stated were missing are in fact exhibited in the record appendixed hereto.

C.

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STATEMENT OF THE CASE

In 1980, plaintiff, petitioner, Dillard invested over one million dollars with securities services companies.

In 1983 Dillard, lost a substantial amount of money at the direction of Merrill Lynch Pierce Fenner and Smith, Inc. (herein "Merrill Lynch"). As things soured with Merrill Lynch Dillard began moving his remaining assets from Merrill Lynch to other brokers, and began trading with other brokers instead of Merrill Lynch; one of which was defendant Security Pacific Corporation, through it's subsidiaries defendant Security Pacific Brokers and defendant Financial Clearing and Services Corporation (herein "Security Pacific").

Merrill Lynch informed Security Pacific of Dillard's excellent credit and Dillard began to trade on credit extended by Security Pacific.

Dillard ordered the transfer of about $86,661 from his, at that moment about

$250,000 value, Merrill Lynch account to his Security Pacific account.

Security Pacific was grossly negligent and failed to liquidate a short position for a loss of about $50,000.

Merrill Lynch breached a contract by failing to deliver all of 52,000 shares of Superior Oil stock.

Dillard sued Merrill Lynch for $256,500 under the provisions of Section 10B of the Securities Exchange Act of 1934, 15 U.S.C. Section 78 J(B) and 17 C.F.R. Section 240.10B5 and Section 17(A) of the Securities Act of 1933 and under the Texas Deceptive Trade Practices Act, Tex. Business and Com. Code Ann. Section 17.41 et. seq. and for common law fraud. H-85-4135 was filed in Federal Court since there was both federal question under 28 U.S.C. 1331 and also diversity jurisdiction under 28 U.S.C. 1332 (A)1. Dillard refused to pay Security Pacific the $50,000. Security Pacific sued Dillard for $56,256 (H-84-

1079). Merrill Lynch moved to compel arbitration and Dillard repudiated arbitration and demanded jury trial and made motion for anti-trust injunction. Security Pacific then made criminal charge against Dillard claiming theft of Dillard's $86,661 claiming it as their own. Security Pacific obtained a default judgement in H-84-1079 due to the harsh application of rules of which Dillard was ignorant. Dillard sued Security Pacific for negligence and securities fraud concerning the $50,000 short sale loss and for defamation, conspiracy, false swearing, bribery, extortion, and racketeering concerning the criminal charges (H-86-3251). Three successive no probable cause criminal prosecutions instigated by Security Pacific, solely for the perverse purpose of gaining a bargaining advantage in the civil litigation, and promoted by Merrill Lynch and Jenkins & Gilchrist were quashed and dismissed.

H-86-3251 was dismissed and appealed and overturned and remanded; the dismissal of the $50,000 negligence and securities fraud claim was upheld due to the prior default but the dismissal of the R.I.C.O. and all other charges stemming from the criminal prosecution was reversed. Supplemental complaint to H-86-3251 was filed naming Merrill Lynch and Jenkins & Gilchrist as defendants and co-conspirators and naming the parent corporation, Security Pacific Corp. as defendant and adding additional charges of malicious prosecution, abuse of process, and anti-trust violations to the complaint; Securities Industry Association was added as an anti-trust defendant. The supplemental complaint was stricken.

H-88-2848 was filed in place of the stricken supplemental complaint in order to be sure that the new causes of action could not be lost to statute limitations. H-88-2848 charged violation of the Sherman Act, Clayton Act, R.I.C.O. Act, Hobbs Act,

malicious prosecution abuse of process, defamation and securities fraud claims. Orders of dismissal and abatement were entered in H-88-2848 and were vacated upon appeal. Arbitration was ordered in H-85-4135 and the action was finally dismissed. Order of dismissal and abatement was again entered in H-88-2848 and again appealed this time in consolidated appeal with H-85-4135.

H-86-3251 was ordered to be re-pleaded in amended complaint. First amended complaint included violation of R.I.C.O. Act, 18 U.S.C. Section 1961 et. seq., Hobbs Act, 18 U.S.C. Section 1951, defamation, abuse of process, and malicious prosecution. Title 42 civil rights violations charging false arrest and false imprisonment were added and the bribery charge was dropped as were the securities fraud charges. The court refused to allow the addition of any new defendant. H-86-3251 was dismissed and appealed and was

consolidated in appeal with H-88-2848 and with H-85-4135.

H-88-2848 and H-86-3251 were affirmed in part and reversed in part and remanded. The final dismissal of H-85-4135 was affirmed. In consolidated appeal the three actions were appealed to the Supreme Court of the United States on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

The judgement sought to be reviewed was entered May 15, 1992. Copy of the judgement can be found in the Appendix attached hereto.

The application for Writ of Certiorari is made under the provisions of 28 U.S.C. Section 2101(C) and other applicable federal statutes.

ARGUMENT

The Fifth Circuit has arbitrarily decided that Dillard has not shown the loss of his right to trial by jury to be unfair or oppressive. Dillard disputes the appeals court's finding that his loss is not oppressive and unfair; but he also states that it is nowhere found in the Constitution that he must show that loss of his right to trial by jury is oppressive and unfair in order to maintain that right.

The Fifth Circuit has in effect ruled that a fundamental constitutional right can be illegally taken away without consent and that the exclusive remedy is monetary damages; although Dillard demands specific performance and the Constitution of the United States guarantees specific performance. This precedent is illegal and it is dangerous to the welfare of the people of the United States.

While this court in recent years has expanded the types of statutory claims that may be subject to arbitration agreements,

it has not gone so far as to interpret the Federal Arbitration Act (FAA) to require arbitration in the absence of consent. Nor has it given license for securities services firms to use excessive economic power to force consumers into signing away their judicial remedies in favor of arbitration. On the contrary, the court's recent cases are premised on the assumption that arbitration is voluntary and consensual.

Many investors waive their right to a judicial forum by signing arbitration agreements involuntarily. However, the law is that there can be no involuntary waiver. The proposed injunction will correct this anomalous contradiction. Small investors have no choice but to accept pre-dispute, standard-form, brokerage arbitration clauses in order to invest in securities.

Congress enacted the FAA in order to ensure the enforceability of valid arbitration agreements. The Act and its

legislative history demonstrate, however, that Congress was concerned that only voluntary arbitration agreements be enforced, and not agreements that are contained in adhesion contracts which are the product of excessive bargaining power.

Arbitration agreements involve the waiver of the important constitutional right to a jury trial.

This court must place arbitration agreements on the same footing as other consumer contracts generally and must be consistent with common law principles on adhesion contracts.

Dillard does not ask to limit the use of the arbitration process. Rather, he asks that fair arbitration be promoted by enhancing the integrity of the process and if arbitration is to have integrity it must be entered by the choice of the consumer.

The goal of the FAA was not to achieve as much arbitration as possible but rather to assure that arbitration contracts had equal standing with any contract. The

Fifth Circuit's decision in the instant action places arbitration contracts in a class by themselves by requiring a much greater, but not clearly specified burden ("our case law has not established the precise showing a party must make" page 4742 paragraph 1 of opinion) upon the party repudiating the arbitration contract than would be required of any other contract.

See Prima Paint, 388 U.S. at 404 n.12 ("the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.")

The FAA requires that agreements to arbitrate be deemed "valid, enforceable and irrevocable, save upon grounds as exist at law or in equity for the revocation of any contract."

Currently most brokers simply refuse to do business unless a customer signs the arbitration agreement.

A survey by the Division of Market Regulation of the Securities and Exchange

Commission (SEC) demonstrates the growing trend by brokers to require arbitration agreements for all accounts.

The SEC surveyed the use of arbitration agreements at sixty-five firms (all Securities Industry Association members) that account for approximately ninety percent of all customer trading accounts in the United States, including the twenty-five largest New York Stock Exchange member firms. Ninety percent required arbitration agreements for margin accounts, and ninety-five percent required agreements for option accounts. Twenty of the sixty-five responding firms said that they intended or were considering expanding the number of accounts for which an arbitration clause would be required.

That brokerage firms uniformly require arbitration agreements and do not offer arbitration-less accounts even at higher prices suggests a classic market failure. Investors do not shop for brokerage firms on the basis of arbitration clauses because

competition is restrained and controlled by a monopoly.

Under the rules of the self-regulatory organizations, the customer already has the right -- but not the obligation -- to arbitrate any future dispute he may have with the brokerage firm. By agreeing in advance to arbitrate disputes, the customer is reducing his future freedom of action, without receiving any benefit in return.

The growing use of arbitration agreements in the securities industry has led the North American Securities Administrators Association (NASAA) and others to call for federal and state regulation to ensure that agreements are voluntary. In December, 1987, NASAA urged Congress to require brokers to negotiate the agreements.

The proposed "Securities Arbitration Reform Act of 1988," J.R. 4960, 100th Cong., 2d Sess. (June 30, 1988), for example, would have required disclosure and

prohibited brokers from making pre-dispute arbitration clauses a condition of doing business. See 134 Cong. Rec. E 2233 (remarks of Cong. Boucher); E 2239-41 (remarks of Cong. Dingell); E 2245-46 (remarks of Cong. Markey) (daily ed. June 30, 1988), 676-683 (Statements regarding H.R. 4960).

The brokers lobby managed to kill the bill, but the reasons for it's proposal remain outstanding and cry for attention.

Many people recognize the inequity of the current situation and have proposed new law to remedy the inequity. But it is clear that all that is necessary to restore traditional standards of equity is enforcement of existing law - and the injunction requested in this action is an overdue enforcement of existing law.

The Commodity Futures Trading Commission (CFTC) has had arbitration rules since 1976. CFTC Rule 180.3 (b) precludes a commodity broker from entering into a mandatory pre-dispute arbitration agreement

with a customer unless, inter alia, the agreement is not a condition for the customer to utilize the services of the broker, and it contains cautionary language in large bold-face type, which must be separately endorsed by the customer that enumerates the customer's rights and the legal effect of the agreement. 17 CFR 180.3 (b)(1988).

The CFTC regulations were promulgated "to assure that the investor's agreement to compulsory arbitration [of disputes arising out of commodity futures transactions] is 'truly voluntary on the part of the customer'" Wotkyns v. D.E. Jones Commodities, Inc., 791 F.2d 749, 750 (9th Cir. 1986); see also Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 567 F.2d 1174, 1178 (2nd Cir 1977) "It . . . became apparent [to the CFTC] that in many cases arbitration was not undertaken voluntarily by customers, but that customers were compelled to agree to predispute

arbitration clauses as precondition to doing business."

While the proposed injunction may go to to the heart of the process of forming contracts, it does not strike at the heart of the purpose of the FAA, which is to ensure that voluntary arbitration agreements are enforced. See Dean Witter Reynolds Inc., 470 U.S. at 218-219. (FAA expresses Congressional intent to enforce arbitration agreements to the same extent of any other contract, not Congressional intent to prefer arbitration as a dispute resolution mechanism).

In enacting the FAA in 1925 the purpose of Congress was "to make valid and enforceable written provisions of agreements for arbitration of disputes arising out of contract[.]" S. Rep. No. 536, 68th Cong., 1st Sess., 1 (1924). The Act was directed at courts which, "jealous of their own power," had refused to enforce agreements to arbitrate. "[T]he legislative history reveals that what the

Congress intended was merely to overrule by legislation long-standing judicial precedent, which declared agreements [to arbitrate] contrary to public policy, on grounds that enforcement of such agreements would oust the courts of their jurisdiction." American Airlines, Inc. v. Louisville & Jefferson County Air Board, 269 F. 2d 811, 816 (6th Cir. 1959).

The authors of the FAA emphasized that the arbitration agreements to be enforced under the Act were limited to voluntary agreements. The FAA "was passed to ensure that courts would honor the contractual agreements of parties who choose to resolve their disputes by means of the informal arbitration procedure." Keystone Shipping, 855 F. 2d at 3 (emphasis added). The Senate report refers to "the great value of voluntary arbitrations" and the "practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly

entered into." S. Rep. No. 536 at 3 (emphasis added). Similarly, a sponsor of the FAA stated that the "bill simply provides for one thing, and that is an opportunity to enforce an agreement . . . to arbitrate, when voluntarily placed in the document by the parties to it." 65 Cong. Rec. 1931 (1924)(Rep. Graham)(emphasis added).

The "savings clause" in Section 2 of the FAA explicitly reflects Congressional concern that only those arbitration agreements voluntarily entered should be enforced. Arbitration agreements which are the products of compulsion by monopoly provide "grounds as exist at law or in equity for the revocation of any contract". The savings clause also reflects the principles that arbitrators derive authority to resolve disputes only from the voluntary agreement of the parties, see AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 648-9 (1986), and that, absent voluntary agreement, there is

no constitutional, statutory, or common-law "right" to insist upon the arbitration of a dispute.

While expanding the scope of arbitrable claims, this court has emphasized the need for courts to be vigilant in policing the savings clause. See Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide 'grounds for the revocation of any contract'"; Shearson/American Express, 107 S.Ct. at 2337 (emphasis added).

Congress' concern that only voluntary arbitration agreements be enforced was based in part on constitutional concerns because arbitration necessarily entails relinquishment of one's Seventh Amendment right to a jury trial (see Bernhardt v. Polygraphic Co. of America, 350 U.S. 198,

203 (1956); Pierson v. Dean, Witter, Reynolds, Inc. 742 F.2d 334, 339 (7th Cir., 1984) or an Article III forum, at least to the extent a dispute involves state common law or state statutory claims. See Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 848, 853-855 (1986) (Article III normally confers personal right to "an impartial and independent federal adjudication" of state law claims); Geldermann, Inc. v. Commodity Futures Trading Commission, 836 F.2d 310, 316 (7th Cir. 1987), cert. denied, S. Ct. 54 (1988).

"The Seventh Amendment provides that '[i]n Suits at Common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...' The phrase 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not." Atlas Roofing Co. v.

Occupational Safety and Health Review Commission, 430 U.S. 442, 449 (1977).

Article III extends the judicial power of the United States to "all cases, in Law and Equity." U.S. Constitution, art. III, 2. "[A] 'private' right for which state law provides the role of decision ... is ... a claim of the kind assumed to be at the 'core' of matters normally reserved to Article III courts." Commodity Futures Trading Commission v. Schor, 478 U.S. at 853. Analysis under the Seventh Amendment and Article III is similar when considering whether Congress may assign the adjudication of certain claims to a non-judicial form. See: Atlas Roofing Co., 430 U.S. at 455 and Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions, 95 Yale L.J. 1459 (1986).

During the hearings on the FAA, Congress was assured that "'[t]he constitutional right to jury trial is

adequately safeguarded' by the Act." Prima Paint, 388 U.S. at 413 (Black J., dissenting).

Mr. Cohen, the American Bar Association's draftsman of the bill, assured the members of Congress that the Act would not impair the right to a jury trial, because it deprives a person of that right only when he has voluntarily and validly waived it by agreeing to submit certain disputes to arbitration (emphasis added).

The arbitration contract in question here (90-2722, page 202-203, paragraph 9) would necessarily not withstand scrutiny under constitutional waiver analysis. D.H. Overmyer Co. v. Frick Co., 405 U.S. at 183 (more than contract law involved in waiver of constitutional rights); K.M.C. Co. v. Irving Trust Co. 757 F.2d at 756. Even if arbitration may be a commercially reasonable substitute for a judicial forum in many circumstances, and is often more desirable than litigation because of its

relative speed and cost, arbitration does not offer the same guarantee of a fair and independent adjudication that is provided by a Seventh Amendment jury trial or an Article III life tenured federal judge.

D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188 (1972) - Contractual waiver of due process rights may be unconstitutional "where the contract is one of adhesion, where there is great disparity in bargaining power; National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2nd Cir. 1977) Contractual waiver of right to jury trial is ineffective when there was "gross inequality in bargaining power".

As the court noted in Bernhardt v. Polygraphic Co. "The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed by the Seventh Amendment... Arbitrators do not have the

benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial ..." 350 U.S. at 203. These characteristics remain accurate today. See Shearson/American Exp., Inc. v. McMahon, 107 S.Ct. at 2354 (Blackmum, J., dissenting). Loss of property in an arbitration proceeding compelled without consent where mistake of law is no grounds for reversal is a violation of the Fourteenth Amendment wherein it states "Nor shall any state deprive any person of ... property without due process of law..."

This court has indicated that "excessive economic power" would provide grounds for the revocation of an arbitration agreement. Shearson/American Express, Inc. v. McMahon, 107 S. Ct. at 2337; also Perry v. Thomas, 107 S. Ct. at 2527 n. 9 (sending unconscionability claim

back to lower court). But the Fifth Circuit has ruled in the instant action that use of excessive economic power is not unfair nor is it unconscionable.

By ensuring that broker-customer arbitration agreements are voluntary, the injunction will enhance the integrity of the arbitration process and minimize the need for judicial enforcement of arbitration agreements and awards.

The injunction thus serves to protect against claims "that the agreement to arbitrate resulted from the sort of fraud overwhelming economic power that would provide grounds 'for the revocation of any contract.'" Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) (quoting 2 of the Act). With the option of not signing and still opening an account, securities customers who refuse arbitration will again have access to the options and margin account market which access is currently totally

denied by the defendant's group boycott. See White and White v. American Hospital Supply 540 F. Supp. at 958 wherein "it is sufficient, to establish illegal boycott, if members of boycott have collective capacity to deny their victims access to the market."

The proposed injunction has many beneficial effects. The anti-competitive effect of uniform denial of services to force arbitration upon consumers who do not want to arbitrate is prohibited. Services can not be denied on the basis of rejection of mandatory arbitration because the injunction forces compliance with the no consent no waiver imperative which is integral to the intent of the FAA.

The defendants have not denied the existence of the monopoly. Instead all their rebuttal is directed toward refuting the allegation of conspiracy to monopolize. Their premise being that if the monopoly was an accident it is not illegal. But they ignore the prohibitions in Section 2

of the Sherman Act against the economy damaging condition of monopoly exclusionary actions regardless of how created.

Anti-trust Law and economics third edition by Ernest Gellhorn: "Several general observations about the Sherman Act serve as a guide to understanding it. Note how the basic thrust of the two sections differs. Section 1 requires duality of action. One person cannot contract, combine or conspire by himself; the essence of the offense is the act of joining together. Section 2, on the other hand, applies to unilateral conduct: "every person who ..." Consequently the case law under Section 1 is often concerned with finding some agreement, as opposed to that of Section 2 where the prime concern is a structural condition (monopoly).

Section 1 focuses on restrictive agreements (wrongful purposes or effects) while Section 2 examines the aggrandizement or misuse of monopoly power (exclusionary

actions). True, both sections seek ultimately the same end - curtailment of practices resulting in market control - but Section 2 is generally limited by a threshold finding of monopoly power. Even though the two sections approach the monopoly problem differently, it is clear that the means by which markets are controlled or competition dampened is a matter of indifference. Ultimately it is irrelevant whether a trade restraint was accomplished by a contract or by some looser form of agreement, or even by the sheer aggregation of market power."

Conspiracy is a jury issue. But the monopoly, the sheer aggregation of market power and the misuse of that power by concerted denial of necessary services to force waiver of constitutional rights is not at issue it is common knowledge and it is admitted by the monopolist defendants in this action. And it is evidence substantiating Dillard's claim of no valid contract to arbitrate - evidence that the

Fifth Circuit in error ignored. The paradox is that the Fifth Circuit remanded the anti-trust action for trial but refused to consider that there is any difference between an adhesion contract (1) and an adhesion contract illegally compelled by restraint of trade by monopoly (2). (1) may be legal but (2) is certainly void and illegal.

"An agreement might be considered to achieve monopoly power when adopted by firms enjoying 80% of the market" U.S. v. Huck Co. 214 F. Supp. at page 778. In the instant action it has been conclusively established that we have an agreement adopted by firms enjoying 95% of the options account market and the underlying dispute with Merrill Lynch occurred in an options trading account. Options accounts are "... any part of the trade or commerce..." and as such are covered under the Sherman Act proscriptions against monopolizations and restraints and an

identical situation of a trade organization adopting a uniform arbitration clause and imposing it on consumers by denial of services has been found to be a violation of the Sherman Act by this Court in Paramount Famous Lasky v. United States 34 F. 2nd 984, 282 U.S. 30. See also U.S. v. First National Pictures, Inc. 282 U.S. 44.

Even if the arbitration to be had was fair, there was still no contract to arbitrate since the essential element of consent is missing from the arbitration contract. Adhesion contracts may be legal if they are not compelled by monopoly but compulsion by monopoly is unfair and unconscionable and an adhesion contract compelled by monopoly is certainly null and void. Therefore the decision of the arbitration panel must be void because the order to arbitrate was made in the absence of any binding contract compelling arbitration and over the constant objection of Dillard who demanded judicial determination of the dispute and trial by

jury.

Fairness of the arbitration process should not be an issue since compulsory arbitration is entirely a creature of contract. The making of the contract is the controlling issue because if there is no contract there can be no order to arbitrate. But it can be demonstrated that the arbitration process is not fair.

The primary problem with arbitration before a panel that is invited and compensated by the industry is that the industry can manipulate the panel. Those arbitrators that rule that the industry must pay damages in certain kinds of complaints or that rule for large or punitive damages are simply not invited back. Those arbitrators who conform to the desires of the industry concerning amount and type of damages can expect repeated employment.

The industry realizes that to win too often is counterproductive. So they

restrain themselves to elimination of large damages and to maintaining a capacity to control which they exert to controlled advantage.

Dillard did not consent to arbitrate. Dillard has raised issue of illegal arbitration contract in the pleadings of H-85-4135 (item 16 p.108 and item 17 p.138 Appendix) Plaintiffs Motion for Trial by Jury Restricted to Specific Issue of the Arbitration Agreement) and in Complaint of H-88-2848 (see 90-2761 item 33 page 251). In both the motion and complaint the pleading of Dillard is identical: "Assent was not voluntary, it was coerced by the advantage of defendants which was unlawfully exercised. Unlawful advantage of defendants consisted of threat to prohibit trade of plaintiff in securities. The threat constituted duress which induced plaintiff to sign the contract contrary to plaintiff's will and to plaintiff's detriment. Defendants' threat of restraint of plaintiff's trade overcame plaintiff's

will and liberty of discretion to such an extent as to influence plaintiff to act in a way that plaintiff's judgement and discretion would condemn and prompt him not to do, if free from such influence."

Since Merrill Lynch never filed any answer to the complaint and they neglected entirely to deny the allegation of duress by restraint of trade in the motion this court must consider that for purposes of this appeal that every allegation in the underlined quotation is proven.

There was no consent and without consent there is no waiver of right to judicial remedy. The arbitration must be declared to be null and void. The arbitration was improperly and illegally compelled under the terms of an alleged arbitration contract which because of the illegal conditions under which it was imposed is no contract.

Injunction should be issued by this court prohibiting monopolization of two

securities markets: options accounts and margin accounts by defendants and their co-conspirators by their adopting and agreeing to use, and in using exclusively, as a precondition of any trading, margin and option contracts which contain provisions requiring the determination of all claims and controversies arising under said contracts in arbitration.

In failing to make findings and conclusions on the injunction and on the material issue of the legality of the arbitration contract, the trial court in H-85-4135 violated Rule 52(a) of the Federal Rules of Civil Procedure. Rule 52(a) provides in pertinent part that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its

action." 2B Barron & Holtzoff, Federal Practice and Procedure 1126 (1961). In the words of this court, a full and fair compliance with Rule 52(a) "is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction." May v. Lakeland Highlands Canning Co., 1940, 309 U.S. 310, 316, 60 S. Ct. 517, 520, 84 L.Ed. 774, 779; "[W]here the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgement and remand the action for appropriate findings to be made." 5 Moore's Federal Practice paragraph 52.06[2], at 2718 (2d ed. 1969).

However, the appellate court did not do that and now this court may instead grant or refuse the requested injunction itself and provide findings of fact and conclusions of law upon it's own decision since compliance with Rule 52(a) is not a

jurisdictional requirement for appeal. Dillard does so move this court.

Dillard made motion for preliminary injunction 9/11/85 - it was ignored. Dillard made Rule 52 motion for findings of fact and conclusions of law on the injunction request on 3/4/88. The Rule 52 motion was denied without any explanation whatsoever on 1/29/90. Why so long? Because pro se litigation is delayed if it cannot be dismissed at the U.S. District Court's Houston Division.

"Trial by jury is a fundamental guaranty of the rights and liberties of the people; consequently every reasonable presumption should be indulged against it's waiver" Hodges v. Easton Wis. 1882, 1 S. Ct. 307, 106 U.S. 412, 27 L. Ed 169. "Party seeking enforcement of waiver of right to jury trial which is claimed under contract executed before litigation is contemplated must prove that consent was both voluntary and informed." See Leasing Service Corp. v. Crane, C. Association 4

(N.C.) 1986, 804 F. 2nd 828 and National Equipment Rental Ltd. v. Hendrix, 565 F. 2nd 255, 258 (2nd cir. 1977).

"It is elementary that the Seventh Amendment right to a jury is fundamental and it's protection can only be relinquished knowingly and voluntarily", see: Johnson v. Zerbst, 304 U.S. 458, 58 Ct. 1019, 82 L. Ed. 1461 (1938). Heyman v. Kline, 456 F. 2nd 123, 129 (2nd Cir. 1972), cert denied, 409 U.S. 847, 93 S. Ct. 53, 34 L. Ed. 2nd 88 (1972). Indeed, a presumption exists against it's waiver. See Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 57 S. Ct. 809, 81 L. Ed. 1177 (1937). "In the civil no less than the criminal area, courts must indulge every reasonable presumption against waiver of fundamental rights." Fuentes v. Shevin 407 U.S. 67, 32 L. ed 2nd 556, 92 S Ct. 1983. The Fifth Circuit has ruled contradictorily in the instant action that a presumption exists for a waiver.

In order to prove the lawfulness of their arbitration clause defendants must show that Dillard voluntarily agreed to waive his Seventh Amendment rights. They must show that he gave his consent without duress, indeed that he had a choice between arbitration and jury and that he voluntarily consented to arbitration. Is that what they have shown? Quite to the contrary they make no allegation that he had any choice. In the brief of Securities Industry Association Inc. in prior appeal of H-88-2848 to 5th Circuit #89-2583 page 6 line 3 it states "While Dillard may not have a choice of forum [between jury and arbitration], that lack of choice does not establish tangible economic injury." Dillard submits to the court that he is certainly economically damaged for the purpose of establishing right to damages under the federal anti-trust acts. But his right to a Constitutional guarantee does not rest upon proof of economic injury nor upon proof that denial was unconscionable

and that the alleged waiver of his right to jury trial rests solely upon defendants providing proof of his voluntary, informed, consent. Defendants show no such proof instead they admit apparent "lack of choice". If there is no choice there is no waiver. This no choice no waiver imperative should be declared by injunction to restore Dillard's Constitutional rights and to restore the Constitutional rights of the investing public and to alleviate the damage being done to Dillard and to many others like him as a direct result of the broker's unrestrained monopoly.

The right of jury trial in civil cases is a basic and fundamental feature of federal jurisprudence which is protected by the Seventh Amendment to the Constitution of the United States. See Bailey v. Central Vermont R. Co. 319 US 350, 87 L ed 1444, 63 S.Ct. 1062.

Right to trial by jury is a right which is justly dear to the American people

and right to trial by jury should be jealously guarded by the courts. See Jacob V. City of New York, 315 U.S. 752, 86 L. Ed 1166, 62 S. Ct. 854.

Any curtailment of this right should be scrutinized with the utmost care. See Baylis v. Traveler's Insurance Co. 113 U.S. 316. The standard set by this court in the Baylis case was that right to trial by jury was absolute and inviolate unless there was waiver of the right "by consent of the parties".

Consent means voluntary agreement. But signing the adhesion contract which demanded compulsory arbitration in lieu of jury indicated only submission to the duress of the threat of restraint of the trade by the Securities Industry Association's monopoly.

There is a big difference between consenting and submitting. Every consent involves a submission; but a mere submission does not necessarily involve consent.

Consent is an act unclouded by duress. See Heine v. Wright, 76 Cal App 338, 244 P. 955, 956.

Consent is an act of reason, the mind weighing as in a balance the good or evil on each side. 1 story, Eq. Jur sec. 222 and Lervic v. White Top Cabs, La. App., 10 So. 2nd 67, 68, 73.

There is no "consent" to the monopolies uniform compulsory arbitration clause. The American public submits or it does not trade. The public's Constitutional right to demand trial by jury is stolen by the concerted power of the broker's monopoly.

There is no issue of monopoly. Monopoly is admitted by the Defendants. They did not deny the fact that their association controls over 95% of the defined options account market and over 90% of the defined margin account market. They did not deny the refusal of services to those who do not sign compulsory

arbitration contract; they did not deny the concert of action of the association in using a standard form adhesion contract compelling arbitration.

They did deny that the monopoly was created by conspiracy but conspiracy is a jury question.

What they fail to realize is that it does not matter if the monopoly was created legally. Even if it was created by an act of God, if it's result is monopolization of any part of the trade or commerce and if it restrains trade or if it serves to nullify a Constitutional right of the U.S. public; that monopoly must be broken. Dillard has so proposed starting with preliminary injunctive relief.

Right to trial by jury is nullified and made worthless by the concerted actions of substantially all of the providers of securities brokerage services. You have right to trial by jury unless you consent to sign that right away but you must sign the right away or the brokers monopoly

dictates that you shall not trade, and their association controls the entire market- so there is no consent and the Constitutional guarantee of right to demand trial by jury is nullified and worthless in transactions which comprise a substantial amount of the trade and commerce of this nation.

A monopoly which has the effect of nullifying a Constitutional guarantee is per se illegal and must be broken at least to the extent of it's harmful effect upon the Constitutional guarantee.

Each judge of this court enjoys his position by reason of his oath to protect and defend the supreme law of this land, the Constitution of the United States and the Bill of Rights thereof.

The Constitution of the United States is threatened by a powerful monopoly.

This court is honor bound to attack the monopoly.

Like the sworn soldier who has received his marching orders I expect this

court to attack the monopoly not as a matter of choice or discretion, but because on your oath as United States Supreme Court Judges you are absolutely required to strike down anything that destroys the integrity of a Constitutional right.

There is a clear and present danger to the Constitution of the United States; the Constitutional right to jury trial has been made a nullity by the concerted actions of a powerful monopoly. A Constitutional right cannot be restricted by legislative or judicial action; how then can a monopoly render it worthless? It can not!

The Constitution is the Supreme Law of this land and this court must protect and defend the American people's constitutional rights. The best way to do that would be to grant the Writ of Certiorari and then to consider the injunction.

"In determining any controversy arising under anti-trust laws, the interests of the consuming public are paramount." 315 U.S. 143, 86 L. Ed. 750.

The industry-wide standard form arbitration clause in the contract with Merrill Lunch was forced upon Dillard lest he could have no service and a similar arbitration clause was refused by him at Drexel, Burnham, Lambert, Incorporated, and he was denied service. Dillard has pleaded that nowhere could he find any provider of margin and option account services which would provide the services without compulsory arbitration. Both the refused and accepted under duress contracts have been entered as Exhibits in H-85-4135.

Securities Industry Association admits that "all securities brokers customers trading contracts contain arbitration clauses..." and in its pleading Merrill Lynch admits the same fact. Plaintiff submits to the Court that it should take judicial notice of this admission of accomplished monopoly.

In short: defendants' conduct and the resulting monopoly are per se violations of

substantive federal law and nothing can save them. Even when group boycotts or concerted refusals to deal operated to lower prices or temporarily to stimulate competition, they are banned by the Sherman Act. The rule of per se violations as to group boycotts or concerted refusals to deal has been based by the courts on the ground that such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to do business in accordance with their own judgement; De Filippo v. Ford Motor Co. (1975, CA3 Pa) 516 F2d 1313, cert den 423 US 912, 46 L Ed 2d 141, 96 S Ct 216.

Without the imposition of judicial restraints every powerful combination could exempt itself from the rule of law by exerting the economic power of adhesion demand upon threat of restraint of trade.

The renters of most of the supply of motion pictures in the late 1920's did exactly what the brokers have done 65 years

later. The motion picture monopoly was prohibited by injunction by this court from compelling adhesion arbitration -- and this court must hold the broker's monopoly to the same standard as the Paramount case 34 F. 2nd 984, 282 U.S. 30.

Asserting Dillard's rights under federal antitrust law should be likened to a private Attorney General who protects the public's interest. See Waldron v. Cities Service Co., 361 F.2d 6712, 673 (2d Cir. 1966), cert. granted, 385 U.S. 1024, 87 S. Ct. 743, 17 L. Ed, 2d 672 (1967). Dillard has made request for declaration of class action under F.R.C.P. 23.

In American Safety Equipment Corp v. J.P. Maguire & Co. 391 F.2d at 825, the court recognized that "[a] claim under the antitrust laws is not merely a private matter', because private antitrust actions are an integral part of the effort of the antitrust laws 'to promote the national interest in a competitive economy." 391

F.2d at 826.

The instant action claim under the antitrust laws is not merely a private matter; it affects thousands of investors who are cheated of staggering sums by the concerted action of the brokerage monopoly.

Monopolization, attempt to monopolize and conspiracy to monopolize are separate offenses and the instant complaint charges all three. Please see: Mt. Lebanon Motors, Inc. v. Chrysler Corp. 283 F. Supp 453 (D.C., Pa 1968).

Dillard asked the district court and the Fifth Circuit for a summary judgement against defendants on violation of monopolization restraints under Section 2 of the Sherman Act. Dillard asked the district court for a preliminary injunction and for a permanent injunction and Dillard asked the Fifth Circuit for "... preliminary injunction pending trial." Dillard now asks this court for a summary judgement and an appropriate injunction prohibiting continued monopolization.

> "Every person who shall monopolize... or combine... with any other person or persons, to monopolize any part of the trade or commerce... shall be deemed guilty of a felony" - Sherman Anti-Trust Act.

The monopoly is defined as pervasive in two markets: (1) in margin accounts contracts and (2) in option accounts contracts, within the United States. The monopolists are defined as the members of Securities Industry Association who offer margin accounts or options accounts only if the customer signs standard compulsory arbitration agreement.

There is no genuine issue of material fact about the existence of the monopoly or of exclusionary and coercive conduct by the monopolists. Merrill Lynch calls the monopoly's concerted refusal to deal "conscious parallelism". Dillard calls it a group boycott. But regardless of what you call it there is no doubt that the use of monopoly power to contravene the 7th Amendment (by forcing compulsory arbitration) is a violation of the Section

2 provision of the Sherman Act proscribing monopolization.

Specific illegal intent is not necessary for a violation of Section 2. All that matters for Section 2 purposes is the fact of a restraint of trade by monopolistic practice which is obviously clearly demonstrated and is not at issue. Therefore Dillard moves that this court declare monopoly proven and that this court issue order restraining the monopolists from restraining trade. This can be done by injunction prohibiting attempts by the monopolists to enforce upon Dillard and upon the American public generally, adhesion contracts mandating compulsory arbitration.

Huge sums are lost to the public as a result of the monopoly indemnifying itself against court ordered damage awards and the restraints imposed upon those who resist is harmful to trade and commerce. It is common knowledge and it is admitted by the

defendants that those who resist are excluded from trading. Restraint of trade is injurious to a healthy economy. Therefore we have all the elements necessary for injunction to issue:

1. Monopoly
2. Exclusionary Behavior
3. Fact of Resultant Damage

Immediate injunction is requested because of the irreparable damage being done to the consumers of securities brokerage services and the clear violations of both constitutional and anti-trust law as well as violation of traditional standards of equity.

This court should overrule the Fifth Circuit and uphold by injunction the fair standard of the strict enforcement of voluntary when made arbitration contracts and the prohibition of enforcement of involuntary when made, compulsion by monopoly, arbitration contracts. Legally that is the current standard, but it is not well known or defined since compulsion by monopoly in the making of the agreement to

arbitrate has not been plead since the Paramount Famous Lasky case 34 F. 2nd 984, 282 U.S. 30. Such a standard conforms to all previous legal decisions of this court.

Please see different Paramount case: United States v. Paramount Picture, Inc. (1948) 334 U.S. 131, 142 68 2. CT. 915, 921, 92 L. ED. 2D 1260, 1285 wherein it shows that "In granting an injunction under federal anti-trust acts equity may enjoin conduct which is not illegal per se..."

The greatest assault upon the institution of trial by jury since the founding of the Republic is made by Securities Industry Association by reason of its organization of monopoly power and group boycott which has as its goal and has as its natural and unavoidable consequence to deny Americans their Constitutional rights to trial by jury.

Securities Industry Association and its fellow monopolists are expanding the number and type of accounts that employ

adhesion arbitration upon pain of no services. The monopolists have total control of the defined market: margin and option accounts. This is a classic monopoly as defined by the Sherman Anti-Trust Act.

The pleadings have evidenced the facts of the illegal contract and defendants have failed to even deny the key fact which is compulsion by monopoly in the making of the agreement to arbitrate.

Section 4 of the Federal Arbitration Act provides that: "If the making of the arbitration agreement... be in issue, the court shall proceed summarily to the trial thereof."

Under Section 4, Dillard, by motion in the one action, H-85-4135, and in original complaint in the other action, H-88-2848, demanded trial of the issue of illegal and void arbitration contract due to the duress of restraint of trade and due to illegal compulsion by monopoly in the making of the agreement to arbitrate. The motion has

been ignored and the complaint has been abated and arbitration has been ordered without proper adjudication of the contract dispute in either action. Or, if there was an adjudication then Rule 52 motion for findings of fact and conclusions of law on that adjudication was improperly denied.

The district court order in H-85-4135 states that there was no contract issue because the complaint did not include pleadings attacking the contract to arbitrate. The contract issue had not yet become an issue at the time the complaint in H-85-4135 was drafted. Only when defendant Merrill Lynch attempted to compel arbitration of the complaint did arbitration become an issue. The federal rules provide for objections to an arbitration contract to be made by motion under the provisions of F.R.C.P. 7,8,10, and 12. The facts showing no contract were well pleaded in the motions as an issue preliminary and incidental to the proper

adjudication of the original complaint and therefore the contract issue should have been addressed instead of being ignored.

The arbitration contract issue which is complaint that there is no contract to arbitrate due to illegality in the making of the agreement to arbitrate was abundantly pleaded in the motions in H-85-4135 as an issue and it was well plead in the original complaint in H-88-2848 as a cause of action. H-85-4135 and H-88-2848 were consolidated upon appeal by order of the Fifth Circuit. Is the position of the Fifth Circuit that the contract issue can be ignored because it can not be raised by motion? Or is it that the motion pleading was deficient because it failed to conclusively prove that arbitration was unfair and unconscionable? Both positions are incorrect and are unsupportable. And even were they to be correct (and they are not) Rule 52 mandated an explanation and an explanation is most especially necessary when the litigant requesting it is pro se.

The district court and the Fifth Circuit have violated the "shall proceed summarily" mandate of Section 4 of the FAA. Please see: Refinery Employees Union v. Continental Oil Co. 268 F. 2nd 477 (Fifth Circuit 1959): "Where party to contract providing for private arbitration asks court for a decree ordering specific performance of contract to arbitrate, court, before rendering such a decree, has obligation of determining as a preliminary matter, that other party has contracted to refer issue involved to arbitration."; and Wicks v. Atlanta Marine, Inc. 605 F. 2nd 166, 168 (Fifth Circuit, 1979) "Arbitration induced by fraud must be judicially determined before stay can issue."; and Eastern Marine Corporation v. Fukaya Trading Co. 364 F. 2nd 80 (Fifth Circuit, 1966) Certiorari denied 87 S. Ct. 508, 385 U.S. 971, 17 L. Ed. 2nd 435. "Arbitration may not be compelled as to issue of whether contract was ever made or was void for illegality but other issues

are arbitrable."; and Robert Lawrence Co. v. Devonshire Fabrics, Inc. C.A.N.Y. 1959 271 F. 2nd 402 Certiorari dismissed 81 S. Ct. 27, 364 U.S. 801, 5 L Ed. 2nd 37. "If arbitration clause itself was induced by illegality, there can be no arbitration and there must be judicial trial of that question before stay can issue pending arbitration."

It is of exceptional importance for this court to find that the monopoly should be restrained by permanent injunction or in the alternative by preliminary injunction pending the trial and for this court to issue an injunction. Dillard does so move the court.

The injunction can be quite simple. It should include a finding that contracts for margin accounts and option accounts provided by brokerage and securities services companies to the public for trade and commerce in stocks, bonds and options can not require acceptance of an arbitration provision as a pre-condition to

trade and commerce in stock, bonds and options; this order being necessitated by a finding that in excess of 90% of the providers of these financial services have made acceptance of an arbitration provision a precondition to trade and commerce in stocks, bonds and options within said margin and option accounts.

Therefore their mutual action has resulted in adhesion arbitration having monopoly power which is a monopolization as proscribed by Section 2 of the Sherman Act; this irresistible economic power robs the public of consent and without consent any agreement allegedly waiving the fundamental Constitutional right of trial by jury, under the Seventh Amendment guarantee, must be void.

Therefore the arbitration agreement in this action is void as are all like arbitration agreements which have similarly been imposed by the monopoly by restraint of the trade of those who refuse to agree

to arbitrate disputes in place of judicial determination or jury trial.

The Fifth Circuit declined to read all of Dillard's complaints together although the actions had been consolidated. The "tangled web of litigation" was not of Dillard's making. Dillard tried repeatedly to add to existing complaint by motion to amend complaint (ignored) and by filing supplemental complaint (stricken). So filing a new complaint was his only recourse. Then he tried repeatedly to consolidate (denied) but the district court would not allow that either, leading to endless argument about what had been or should be decided where. Rule (8)F requires that "all pleadings shall be so construed as to do substantial justice" which in this instance means that all the complaints should be considered as a whole.

The crime of false imprisonment is well pleaded and it is a substantial violation of civil rights under Title 42; although the Fifth Circuit improperly

affirmed dismissal of the civil rights complaint for failure to state a claim.

The Fifth Circuit did not review dismissal of Dillard's extortion complaint under the Hobbs Act because they said he did not raise the issue but in fact he did raise the issue on page 5 of Addendum to the Brief of Appellant which was filed with the permission of the Fifth Circuit wherein Dillard complained that: "... the R.I.C.O. complaint, Extortion Complaint, Abuse of Process by Extortion Complaint, and Title 42 civil rights violations are all properly plead." If indeed there were no private right of action it could not be properly plead and therefore Dillard raised the issue of private right of action for violation of the Hobbs Act claiming injury due to extortion under color of official right. Dillard claims private right of action for violation of the Hobbs Act under the provisions of the R.I.C.O. Act.

Survival of Dillard's fraud claim against Merrill Lynch does not rest upon private right of action under Section 17(a) because of other private rights of action also plead. But Dillard requests that the standard of proof that is required for recovery under the law be no greater than that required under Section 17(a) of the Securities Act of 1933, 15 U.S.C. Sec 77Q. The Fifth Circuit has declared that there is no private right of action under Section 17(a). This issue divides the circuits. Other circuits such as the Second Circuit have long allowed private right of action under 17(a).

Certain statements in the opinion of the Fifth Circuit purported to be fact are incorrect and misleading. The injury caused by Merrill Lynch was not that the stock was liquidated, which it was, it was that the stock was liquidated prior to it being delivered to Dillard. The stock was never received although Dillard had paid hundreds of thousands of dollars to Merrill

Lynch including the purchase of guaranty insurance to absolutely guarantee the delivery.

The Fifth Circuit's allegation of a deficit of $5,000 in Dillard's Merrill Lynch account is not an agreed fact - Dillard has stated that the account should have had a $250,000 positive balance at time he attempted to transfer funds. Merrill Lynch never even answered the complaint and nowhere in the record of any action does Merrill Lynch allege a $5,000 deficit. The status of that account is at issue and there has been no discovery and no adjudication. It is a defamatory abuse for the Fifth Circuit to state this "fact" in the record.

The Fifth Circuit states a failure to buy as the basis for certain of Dillard's claims against Security Pacific. The Fifth Circuit knows but neglects to disclose that the order to buy was a short sale covering. Under the law Security Pacific was

absolutely required to buy: if Dillard ordered it or if the account were not properly margined since a buy was absolutely required in any event for elimination of the short position. These statements of "fact" are in violation of normal standards of fairness and judicial restraint.

This court should study the original records of the instant actions which clearly show improper ex parte contact between the court at Houston and the defendants. At Houston normal rules of fairness are often ignored to the injury of pro se litigants and the pleading standards demanded of pro se litigants are more stringent than for members of the bar. Pro se litigation is unconscionably delayed or summarily dismissed - it never comes to trial. This court needs the entire record of the instant actions for proper analysis - but an analysis of the docket sheets alone will give some indication of the problem. The docket sheets are the wrong

size to be bound in this booklet so 40 copies have been sent to your clerk, in the separate appendix, and should be available upon request.

The chief judge at Houston encourages abrogation of the rules in order to "do something" to suppress pro se litigation generally which he regards as a total waste of time. Please see: Elmore v. McCammon 640 F. Sup. 905 (S.D. Tex. 1986). The 1985 and 1986 actions were on his docket for a time until Dillard complained about unconscionable delay and ex parte contact and he removed himself as judge.

The Fifth Circuit has refused to take any supervisory action on Dillard's complaints that the United States District Court for the Southern District of Texas, Houston Division is denying pro se litigants their federally guaranteed right of effective court access.

Dillard has brought to your attention a few problems with parts of the judicial

system over which you have control. He urges you to remember that it is bad form to kill the messenger. Although that is a way to hear only good news; it is unhealthy for the system because problems are hidden rather than remedied. Please understand that Dillard has the greatest respect for the federal judicial system; indeed, the bulk of his complaint pleads for protection of our Constitutionally guaranteed judicial system from being supplanted by private arbitration compelled by irresistible economic power.

For any or all the foregoing reasons this Supreme Court of the United States should grant Writ of Certiorari.

Dated: Grants Pass, Oregon
August 12, 1992

Respectfully Submitted,

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92-857

No.

Supreme Court, U.S.
FILED
AUG 13 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CARVEL GORDON DILLARD,
Petitioner

versus

SECURITY PACIFIC CORP.;
MERRILL LYNCH, PIERCE FENNER & SMITH, INC.;
SECURITIES INDUSTRY ASSOCIATION, INC.;
SECURITY PACIFIC BROKERS, INC.;
FINANCIAL CLEARING & SERVICES CORPORATION;
JENKINS & GILCHRIST (A PARTNERSHIP); and
JENKINS & GILCHRIST (A PROFESSIONAL CORP.)
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VOLUME 1 of 2 VOLUME APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-2722

C.G. DILLARD,

Plaintiff-Appellant,

VERSUS

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC., et al.,

Defendants-Appellees.

No. 90-2761

CARVEL G. DILLARD,

Plaintiff-Appellant,

VERSUS

SECURITY PACIFIC CORP., et al.,

Defendants-Appellees.

No. 91-2135

CARVEL DILLARD,

Plaintiff-Appellant,

VERSUS

SECURITY PACIFIC BROKERS, INC., et al.,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

Before POLITZ, Chief Judge, BROWN and SMITH, Circuit Judges. JERRY E. SMITH, Circuit Judge:

In this consolidated appeal, Carvel Dillard challenges an order compelling arbitration of his 1985 case and orders dismissing his 1986 and 1988 cases. We affirm the order compelling arbitration, affirm in part the dismissals, and remand the 1986 and 1988 cases to the respective district courts.

I.

Carvel Dillard maintained an account with Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") for the purpose of trading securities. The brokerage agreement contained a provision by which the parties agreed to settle any disputes

through arbitration.[1] In December 1983, Merrill Lynch partially liquidated some stock held in Dillard's account -- an action Dillard claims it took over his objection.

Dissatisfied with Merrill Lynch, Dillard entered into an agreement with the Financial Clearing Services Corporation (FCSC), Security Pacific Brokers, Inc., and Security Pacific Corporation (collectively "Security Pacific")[2] on February 14, 1984, whereby Security Pacific agreed to purchase put and call options for Dillard upon request and Dillard agreed to open an account with Security Pacific and keep it fully margined. On February 16, 21, and 23, Dillard delivered to Security Pacific three drafts on his Merrill Lynch account

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[1] Although there appear to be several brokerage agreements between Merrill Lynch and Dillard, we refer to these as "the agreement" or "the contract."

[2] Security Pacific Brokers, Inc., and FCSC are subsidiaries of Security Pacific Corporation. Dillard dealt directly with Security Pacific Brokers, Inc., and FCSC.

totaling $56,256 to finance Security Pacific's trading on his behalf. Merrill Lynch failed to honor the drafts, however, as Dillard's account then had a deficit in excess of $5,000. On February 27, Dillard directed Security Pacific to purchase certain options. Security Pacific did not carry out this order; nor did it carry out a subsequent order for the same options at a different price.

Security Pacific sued Dillard to recover on the bad Merrill Lynch drafts. Although Dillard answered Security Pacific's complaint, he failed to comply with the court's discovery orders, and a default judgment was entered against him. After he filed his answer, Security Pacific (along with Merrill Lynch) instigated a criminal prosecution against him with regard to the bad drafts.

Dillard then filed three pro se federal lawsuits -- respectively, in 1985, 1986, and 1988 -- against Merrill Lynch,

Security Pacific, and other parties involved in the securities transactions and the criminal prosecution. All three of Dillard's lawsuits are at issue in this consolidated appeal.

A.

On July 16, 1985, Dillard filed suit ("the 1985 case") against Merrill Lynch, alleging that it had committed certain fraudulent acts in handling securities transactions on his behalf. His complaint alleged that Merrill Lynch violated section 17(a) of the Securities Act of 1933 ("the 1933 Act"), 15 U.S.C. 5 77q(a); section 10(b) of the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U.S.C. $ 78j(b), and rule 10b-5 promulgated thereunder, 17 C.F.R. 5 240.10b-5; and the Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code Ann. 17.41 et seq.

Merrill Lynch moved to dismiss the complaint for failure to state a claim as required by Fed. R. Civ. P. 12(b)(6); in

the alternative, it moved for a more definite statement on the ground that Dillard had failed to plead fraud with sufficient particularity as required by Fed. R. Civ. P. 9(b). In addition, Merrill Lynch moved to compel arbitration pursuant to the arbitration provisions of his trading agreement with Merrill Lynch and requested a stay pending arbitration.

Dillard then filed a "Motion To Declare Compulsory Arbitration Provisions of Defendant's Adhesion Contracts To Be Invalid, and Unenforceable and To Enjoin Enforcement of Same." In the motion, Dillard for the first time raised allegations of an antitrust conspiracy among brokerage firms to include arbitration clauses in all brokerage contracts.

On March 23, 1987, Judge Ross Sterling held a motions hearing. From the bench he ruled that Dillard had no private right of action under section 17(a) of the 1933 Act; that he had not properly pleaded a cause of

action under rule 10b-5; and that the claims he had properly pleaded were subject to arbitration and should be stayed pending arbitration. He also ruled that Dillard had not properly raised the requests for declaratory and injunctive relief in his pleading. Judge Sterling died before entering the order, and the case was assigned to Judge Sim Lake.

On February 1, 1990, Judge Lake "concur[red] with Judge Sterling's finding of a contract requiring arbitration and ordered the parties to begin arbitration within thirty days. He went on to state that Dillard had made no claim "that creates any question of law, equity or fact that cannot be arbitrated.[3] He also noted that Dillard's request for declaratory and

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[3] At the time of Judge Sterling's bench rulings, it was the law of this circuit that claims under the 1933 Act and the 1934 Act could not be arbitrated. Thus, Judge Sterlinqs dismissal of Dillards $ 17(a) and rule 10b-5 claims was a necessary prerequisite to the arbitration order. Soon thereafter, the Supreme Court held that claims under both federal acts are subject

injunctive relief was not properly raised in his pleadings, stating that "[p]laintiff's motions objecting to arbitration on the grounds of federal anti-trust law or adhesion contracts are irrelevant because they are beyond the scope of his pleadings. In addition, he denied Dillard's Motion for Findings of Fact and Conclusions of Law Concerning Injunctive Relief and Other Previously Filed Motions" that had been filed on October 11, 1989. Finally, he dismissed the entire action without prejudice.

On February 14, 1990, Dillard filed a motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment. Although he took issue with the court's refusal to consider his antitrust allegations as a separate cause of action, he did not amend his

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to arbitration. See Rodriquez de Ouias v. Shearson/Am. Express, 490 U.S. 477, 482-84 (1989) (1933 Act); Shearson/Am. Express v. McMahon, 482 U.S. 220, 238 (1987) (1934 Act). Judge Lake accordingly entered an order compelling arbitration of all claims related to the trading transactions.

complaint to add these allegations. He also filed a motion for trial by jury. These motions were denied.

On March 3, 1990, Dillard initiated arbitration proceedings before the Chicago Board Options Exchange by filing a Statement of Claim, which was a copy of his first amended complaint in the 1985 case. The matter was referred to the National Association of Securities Dealers, which dismissed all of Dillard's claims after an arbitration hearing on January 4, 1991. Dillard now appeals, challenging the district court's arbitration order and dismissal of the case as well as its refusal to enter findings of fact and to enjoin the enforcement of the arbitration provisions.

B.

On August 20, 1986, Dillard filed his second federal lawsuit ("the 1986 case")

this time against Security Pacific.[4] In his original complaint, Dillard brought claims relating to (1) the securities transactions (under federal securities law) and (2) the criminal prosecution (under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., and the Hobbs Act, 18 U.S.C. 5 1951; he also accused Security Pacific of "false swearing" and "bribery").[5]

On May 20, 1987, the court dismissed the suit on res judicata grounds. Judge Sterling reasoned that all of the claims asserted in Dillard's complaint should have been raised as compulsory counterclaims to Security Pacific's suit to recover on the bad Merrill Lynch drafts.

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[4] Dillard initially brought this case against Security Pacific Brokers, Inc., and FCSC. Later, as noted infra, he unsuccesfully attempted to add Security Pacific Corporation as a defendant.

[5] The false swearing, bribery, and Hobbs Act claims were brought as part of the RICO claim.

Dillard appealed, and on January 15, 1988, we affirmed the dismissal as to all claims arising prior to Dillard's answer to Security Pacific's complaint but reversed as to all claims arising after the answer was filed. Specifically, we concluded that the res judicata bar of the default judgment (entered after Dillard had failed to comply with discovery orders) did not encompass Dillard's claims arising out of the criminal prosecution, as the prosecution was instituted after Dillard filed his answer. Dillard v. Security Pacific Brokers, 835 F.2d 607, 609 (5th Cir. 1988) ("Dillard I"). We therefore vacated the dismissal as to Dillard's claims arising from the criminal prosecution and remanded for further proceedings.

Dillard filed a supplemental complaint on July 18, 1988. Judge James DeAnda, to whom the suit had been transferred, struck the supplemental complaint on August 2,

1988, reasoning that Dillard had failed to request leave to file. In his attempted supplemental complaint, Dillard added claims under the federal antitrust laws; he also accused Security Pacific of "malicious prosecution" and of "undertak[ing] an illegal, improper and perverted use of criminal process." Finally, he made accusations against Security Pacific Corporation (the parent company of Security Pacific Brokers, Inc., and the FCSC), Jenkens & Gilchrist (counsel for Security Pacific), Merrill Lynch, and the Securities Industry Association (SIA). The suit subsequently was transferred back to Judge Lake.

After a status conference on September 15, 1989, Judge Lake ordered Dillard to file an amended complaint by October 15, 1989. Dillard did not file an amended complaint; instead, he filed a motion for a stay pending our decision in the 1988 case discussed infra. Judge Lake granted the stay on October 27, 1989. We then disposed

of the first appeal of the 1988 case on May 22, 1988, and Judge Lake ordered Dillard to file an amended complaint by October 5, 1990, or face dismissal.

Dillard complied with Judge Lake's order. His amended complaint added Merrill Lynch, Jenkens & Gilchrist, and the Securities Pacific Corporation as defendants. He also brought claims for defamation, abuse of process, and malicious prosecution, as well as under "Title 42... of civil rights." He did not bring a claim under the federal antitrust laws, nor did he name SIA as a defendant.

In response, the defendants moved to dismiss the complaint under rule 12(b)(6). Judge Lake refused to allow Dillard to add Merrill Lynch, Jenkens & Gilchrist, and Security Pacific Corporation as defendants because "no leave was granted to add new parties." He specifically noted that the "newly added defendants" were dismissed without prejudice. He then dismissed (1)

the federal securities claims stemming from the trading transactions as res judicata on the grounds cited in our Dillard I opinion; (2) the defamation, malicious prosecution, and abuse of process claims as time-barred; (3) the Hobbs Act claim on the ground that the statute cited did not provide a private cause of action; and (4) the RICO and civil rights claims without prejudice for failure to state a claim. Dillard now appeals the district court's disposition of the case.

C.

Dillard filed a third federal lawsuit in 1988 ("the 1988 case") this time against Security Pacific Corporation, Security Pacific Brokers, Inc., FCSC, Merrill Lynch, SIA, and Jenkens & Gilchrist. He asserted antitrust claims against Merrill Lynch, Security Pacific, and SIA; and claims related to the criminal prosecution (i.e., defamation, abuse of process, malicious prosecution, RICO, and Hobbs Act claims) against Merrill Lynch, Security Pacific,

and Jenkens & Gilchrist. He also accused Merrill Lynch and the Security Pacific entities of wrongdoing with regard to the trading transactions.

All the defendants moved for dismissal under rule 12(b)(6). Merrill Lynch also moved to compel arbitration. Judge Hughes dismissed the case in three separate orders. Dillard appealed, and we remanded for the limited purpose of requiring the court to state its reasons for the dismissals.

On July 6, 1990, Judge Hughes issued his opinion explaining his earlier orders. First, he stated that the Security Pacific entities were dismissed because all the claims against them were pending in the 1986 case in Judge Lake's court. He then noted that SIA was dismissed for failure to state a claim against it. With regard to Jenkens & Gilchrist, he stated that the case would be abated until Judge Lake ruled on Dillard's motion to amend his complaint to add Jenkens & Gilchrist as a defendant

in the 1986 case. Finally, Judge Hughes noted that the case against Merrill Lynch was abated until Dillard received a negative ruling on a motion to amend his complaint in the 1985 case to include additional claims against Merrill Lynch. Dillard now challenges Judge Hughes's disposition of the case.

I.

We first consider Dillard's complaints with regard to the 1985 case. He claims that the district court erred in compelling arbitration of his claims, in denying his request for a jury trial, in denying his request for declaratory and injunctive relief, and in failing to enter findings of fact and conclusions of law in connection with the denial of declaratory and injunctive relief.

A.

Judge Lake found that the Dillard-Merrill Lynch contract required

arbitration[6] and that Dillard raised no claim "creat[ing] any question of law, equity or fact that cannot be arbitrated." He therefore ordered the parties to begin arbitration within thirty days and dismissed Dillard's claims without prejudice.[7] Dillard contends that the order compelling arbitration was improper. We disagree.

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[6] The contract states the following:

> It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., as the undersigned may elect.

[7] Dillard argues at length that the district court improperly dimissed his complaint for failure to state a claim. Although Judge Sterling noted from the bench that Dillard had failed to state a claim under the federal securities laws, Judge Lake explicitly dismissed the complaint without prejudice pursuant to the arbitration clause.

Section 2 of the Federal Arbitration Act ("the Act"), 9 U.S.C. § 1 et seq., declares that an arbitration clause involving interstate commerce is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Act also provides that "[i]f the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof." Id. § 4. In a case in which such a trial is required, the Act allows the party resisting arbitration to demand a jury trial. Id.

Dillard contends that he deserves a jury trial on the question of the validity of the arbitration clause.[8] He argues

[8] There is no quegtion that Dillard's substantive claims are arbitrable. See Rodricuez de Ouiias, 490 U.S. at 482-84 (1933 Act claims subject to arbitration); McMahon, 482 U.S. at 238 (1934 Act claims subject to arbitration); Commerce Park at DFW FreePort v. Mardian Constr. Co., 729 F.2d 334, 340 (5th Cir. 1984) (DTPA claims subject to arbitration). The only issue, then, is whether the arbitration clauses at issue in this case are enforceable.

essentially that he has put the "making of the arbitration" clause "in issue" by alleging that the clause is an unconscionable "adhesion contract." He contends that he had no choice but to accept the arbitration clause in the Merrill Lynch contract because the inclusion of the clause was nonnegotiable. He further alleges that he could not go elsewhere because the majority of brokerage firms use such terms in their contracts; he adds that such uniform use is the result of an antitrust conspiracy among brokerage firms.

A party to an arbitration agreement cannot obtain a jury trial merely by demanding one. Saturday Evening Post Co. v. Rumbleseat Press, 816 F.2d 1191, 1196 (7th Cir. 1987). The party resisting arbitration bears the burden of showing that he is entitled to a jury trial under § 4 of the Arbitration Act." Bhatia v. Johnston, 818

F.2d 418, 422 (5th Cir. 1987).[9] Our caselaw has not established the precise showing a party must make. We have, however, suggested that the party must make at least some showing that under prevailing law, he would be relieved of his contractual obligation to arbitrate if his allegations proved to be true. In addition, he must produce at least some evidence to substantiate his factual allegations. T & R Enters. v. Continental Grain Co., 613 F.2d

[9] Under Supreme Court precedent, a party must challenge the making of the agreement to arbitrate" itself in order to create a jury-triable issue. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967). If the party makes allegations regarding the contract as a whole -- e.g., that the brokerage contract is a contract of adhesion -- that issue must go to arbitration. Id. In most cases in which a customer seeks to avoid arbitration by alleging that the contract is one of adhesion, he fails to allege specifically that the arbitration clause is adhesive. See, e.g., Bhatia, 818 F.2d at 422. Dillard has met this threshold requirement, for he focuses specifically on the arbitration provision as an adhesive term.

substantiate his factual allegations. T & R Enters. v. Continental Grain Co., 613 F.2d 1272, 1278 (5th Cir. 1980).[10]

We affirm the district court's order to arbitrate on the ground that Dillard failed to make a sufficient showing that the arbitration provision at issue should not be enforced. Adhesion contracts are not automatically void. Instead, the party

[10] In T & R Enters., the party seeking to avoid arbitration put the existence of the arbitration agreement "in issue" by alleging that although he had signed the agreement, the true agreement between the parties was reached during a telephone converation in which arbitration was not discussed. First, we rejected this argument as "contrary to the universally prevailing rule that . . . one who executes a written contract is bound by its terms." Id. We also noted that we were "rather persuaded" by Almecenes Fernandez, S.A. v. Golodetz, 148 F.2d 625, 628 (2d Cir. 1945), which held that not only must a party deny that he made an agreement to arbitrate, but evidence must be produced to substantiate the denial. Id. See also Interbras Cayman Co. v. Orient Victory Shipping Co., S.A., 663 F.2d 4, 7 (2d Cir. 1981) (reaffirming Almecenes Fernandez).

seeking to avoid the contract generally must show that it is unconscionable. See 6A Arthur L. Corbin, Contracts $ 1376 at 20-21 (1962) and 7-9 (1991 Supp.). Several federal courts have considered and rejected the argument that agreements to arbitrate disputes in the securities context are unconscionable as a matter of law. As explained by the Ninth Circuit,

> The strong federal policy favoring arbitration, coupled with the extensive regulatory oversight performed by the SEC in this area, compel the conclusion that agreements to arbitrate disputes in accordance with SEC-approved procedures are not unconscionable as a matter of law.

Cohen v. Wedbush Noble, Cooke, Inc., 841 F.2d 282, 286 (9th Cir. 1988). See also Adams v. Merrill Lynch, Pierce. Fenner & Smith, 888 F.2d 696, 700 (10th Cir. 1989); Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 61 n.2 (8th Cir. 1984). In addition, Dillard failed to produce any evidence that the agreement to arbitrate was somehow unfair or oppressive in this case.

Moreover, the allegations of antitrust conspiracy do not lead to the conclusion that the Merrill Lynch contract was an unconscionable contract of adhesion. Even if the district court were to find that such an antitrust conspiracy existed, this finding would not compel the invalidation of the agreement to arbitrate; instead, it would lead to an award of damages for any injury stemming from the anticompetitive behavior.[11] Thus, because Dillard failed to show the existence of a genuine issue of

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[11] Section 4 of the Clayton Act, 38 Stat. 731, a amended, 15 U.S.C. S 15(a), provide that any person "injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained ... "

fact to be tried before a jury, we affirm the district court's arbitration order and dismissal without prejudice.[12]

B.

In his "Motion To Declare Compulsory Arbitration Provisions of Defendant's Adhesion Contracts To Be Invalid, and Unenforceable and To Enjoin Enforcement of Same," Dillard attempted to set forth his antitrust conspiracy allegations as separate causes of action.

Judge Lake did not deny this "motion" as Dillard contends; instead, he refused to

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[12] In addition to alleging that he was denied his statutory right to a jury trial, Dillard claims he was deprived of his right to a jury trial under the Seventh Amendment. This argument is without merit. In McMahon, the Court endorsed enforcing agreements to arbitrate statutory claims unless Congress has prohibited waiver of a judicial forum for the particular claim at issue. 482 U.S. at 226-27. We conclude from this that the Seventh Amendment does not preclude "waiver" of the right to jury trial through the signing of a valid arbitration agreement.

consider Dillard's request for declaratory and injunctive relief because Dillard did not properly request such relief in his pleadings.

In order to obtain a permanent injunction or a declaratory judgment, a party must make his request for such relief in his pleadings. Fed. R. Civ. P. 8(a). Dillard's complaint failed to make such a request. Moreover, there was no indication that Dillard was requesting temporary or preliminary relief -- a request that can be made in a motion. 11 Charles A. Wright, et al., Federal Practice and Procedure § 2949 at 467 (1973). Therefore, Judge Lake properly refused to consider Dillard's allegations apart from Dillard's attack on the validity of the arbitration clauses per se.[13]

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[13] Dillard claims that he was entitled to finding of fact with regard to the denial of injunctive and declaratory relief. Fed. R. civ. P. 52(a) require such findings in "actions tried upon the facts without a jury" and with regard to "granting or

III.

With regard to the 1986 case, Dillard contends that the district court erred in dismissing his defamation, malicious prosecution, and abuse of process claims as time-barred and in dismissing his civil rights and RICO claims for failure to state a claim.[14] These grounds of error are addressed below.

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refusing interlocutory injunctions." Neither situation was present in this case. First, no action was tried to the court without a jury. Judge Lake ordered the parties to commence arbitration; he settled no substantive claims. Second, Dillard did not make a request for an "interlocutory injunction." Rather, he requested a declaratory judgment and permanent relief from his obligations under the arbitration clause.

[14] Dillard also challenges the district court's refusal to allow him to add Merrill Lynch, Jenkens & Gilchrist, and Security Pacific Corporation as new party defendants. This refusal was proper, as he failed to request leave of court.

In addition, Dillard attacks the district court's dismissal of his allegations and claims related to the trading transactions. Those claims are barred by Dillard I, however, and were properly dismissed. Finally, we do not consider the court's dismissal of Dillards Hobb Act claim, as he does not raise it as a ground for error.

A.

Dillard filed his original complaint in this suit on August 20, 1986, accusing Security Pacific[15] of "[f]alse [s]wearing" and "brib[ing] a law enforcement officer" in connection with the filing of criminal charges against him. He also alleged that [t]he false criminal charge was one of a number of outrageous actions done by defendant[] to harass and oppress" him. These charges were based upon the fact that "[i]n August 1984 defendant[] made a knowingly false affidavit charging theft by plaintiff . . . ." At the time of the filing of his 1986 complaint, Security Pacific had complained to the authorities, and an indictment had been issued on August 19, 1985.

Several events occurred after the filing of this original complaint. The

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[15] As noted supra, the 1986 case started and ended as a case against FCSC and Security Pacific Brokers, Inc.

indictment was quashed on September 16, 1987. On that same day, a second indictment was issued but was dismissed on June 21, 1988. On July 18, 1988, Dillard filed his supplemental complaint (which was stricken for failure to ask leave of court to file it) alleging a "pattern of baseless repetitive claims" constituting "a badge of malicious prosecution." He also alleged "an illegal, improper and perverted use of criminal process."

Dillard specifically raised abuse of process, malicious prosecution, and defamation causes of action on October 5, 1990, in his first amended complaint, which he filed after we remanded to the district court to consider Dillard's claims arising from the criminal prosecution in Dillard I. The district court used the date of the first amended complaint October 5, 1990 for purposes of calculating the timeliness of Dillard's malicious prosecution, abuse of process, and defamation causes of action and found that all three were time-barred.

Use of this tolling date would be erroneous, however, if the claims in the amended complaint stemmed from the same "transaction or occurrence" addressed by the original complaint. In such a case, the amended complaint would "relate back" to the filing of the original complaint. Under Tex. Civ. Prac. & Rem. Code $ 16.068,[16] which is similar to Fed. R. Civ. P. 15, the limitations period is tolled by the first pleading related to the transaction or occurrence:

> If a filed pleading relates to a cause of action, cross action, counterclaim, or defense that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.

Texas courts have employed section 16.068 both to save defective pleadings and to

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[16] Under Erie R.R. v. Tompkin, 304 U.S. 64 (1938), we must evaluate the state of limitations issues in accordance with Texas law.

allow amendments alleging separate but related bases of recovery.[17] Thus, the inquiry is not whether an amended complaint adds a new or different cause of action; rather, it is whether that new or different cause of action is wholly based upon, and grows out of, a new, distinct, or different transaction or occurrence. Meisler v. Republic of Tex. Sav. Assn, 758 S.W.2d 878, 882 (Tex. App. -- Houston [14th Dist.] 1988, no writ).

As the record now stands, we cannot discern whether the defamation, abuse of process, and malicious prosecution claims grew out of a "wholly . . . new, distinct, or different transaction or occurrence." We thus remand the timeliness issue to the

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[17] See, e.g., Abbott v. Fov, 662 S.W.2d 629, 631 (Tex. App.-- Houston 114th Dist.] 1983, writ ref'd n.r.e.) (amendment cured defective complaint); Bradley v. Etessam, 703 S.W.2d 237 (Tex. App. -- Dallas 1985, writ refd n.r.e.) (amendment adding wrongful death cause of action related back to original complaint alleging medical malpractice).

district court for consideration of the relation-back issue. We also cannot discern from the district court's opinion whether Dillard properly raised the relation-back issue.[18] If he did not, we cannot consider the issue on appeal, see Way v. Reliance Ins. Co., 884 F.2d 866, 868 n.3 (5th Cir. 1989); thus, there would be no need for the district court to address the issue on

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[18] There is only one sentence in the district court's opinion that touches on the issue, where the court states that "Dillard asserts that because the [defamation] cause of action based upon the second indictment was timely raised in the 1988 case], it is not time-barred in this action." This is similar to Dillard's ground for error before this court. Although he does not specifically raise the Texas "relation back" statute, he does ask us to consider the "earliest pleading in any action as tolling the statute" of limitations. We believe this is sufficient (but just barely) to raise the "relation back" issue for appellate review, as Dillard asks us to consider "any" pleading -- which could include earlier pleadings in the 1986 case -- in addressing the statute of limitations question. It appears from the district court's recitation of Dillard's argument that he did not make a similar request to the district court. We leave it to the district court, however, to answer this question.

remand, for its opinion on the timeliness issue would have become final.

B.

We agree with the district court that Dillard failed to state a claim under either RICO or federal civil rights law.[19] Dillard argues, however, that when read in conjunction, his 1985, 1986 and 1988 complaints (and amendments thereof) do state a claim.

We decline Dillard's invitation to read all of his complaints together. This tangled web of litigation is of his own making. Thus, we do not agree that "substantial justice" requires us to hold, as he suggests, that "if a cause of action is properly plead[ed] in any action or in any combination of actions it is properly plead[ed]."

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[19] The district court held that although "[i]t is perhaps possible that a RICO claim may lie buried somewhere" in Dillard's complaint, it could not find it. After examining Dillard's complaint, we agree and affirm the dismissal.

IV.

Finally, with regard to the 1988 case, Dillard argues that the district court erred in dismissing SIA from the suit for failure to state a claim against it, in abating the suit against Merrill Lynch and Jenkens & Gilchrist, and in dismissing the Security Pacific entities on the ground that similar claims were pending against them in Dillard's 1986 case.

A.

Dillard's sole complaint against SIA is its involvement in the alleged antitrust conspiracy.[20] In his 1988 suit, Dillard repeats the allegations he raised in his injunction motion in the 1985 suit. Essentially, he points to the fact that the vast majority of brokerage agreements contain arbitration clauses and alleges that those clauses are the result of an

[20] In his complaint, Dillard states in his prayer for relief "[t]hat S.I.A. would be found guilty only of anil-trust law violations."

antitrust conspiracy in the brokerage industry.

Judge Hughes dismissed SIA because Dillard failed to state an antitrust claim against it. As Judge Hughes noted,

> The Association could have been a clearinghouse for price fixing information, but Dillard did not make that allegation. The Association is not a market participant, and Dillard failed to allege facts that it was a conduit for conspiratorial anti-competitive pricing or monopolization. This lack of sufficient factual allegations constitutes failure to state a claim against the Association for antitrust violations.

In paragraph 22 of his complaint, however, Dillard made the precise allegation Judge Hughes thought was missing. In that paragraph, Dillard alleged the following:

> Defendants and their co-conspirators, in order to effect monopolization, acted with the intention that services be unavailable except on similar unfair terms[;] and legal seminars, and <u>legal bulletins of the conspirators' trade association S.I.A. and other exchanges of information on model arbitration clauses</u> and their intent to use them caused each individual company to know that others would act in conjunction with it to restrain the trade of those who refused to arbitrate.

Although the allegations connecting SIA to the conspiracy are somewhat inartful, there is no question that Dillard made them.

SIA seems to acknowledge this in its brief, for it restates Dillard's allegations that it acted as a clearinghouse for anti-competitive information.[21] SIA, therefore, argues that there are two additional deficiencies in Dillard's complaint: Dillard (1) failed to allege an agreement or conspiracy among the brokerage firms; and (2) failed to allege facts to show how he has been economically damaged.

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[21] As SIA notes, "Dillard asserts that SIA disseminated information about the use of [model arbitration clauses] to its members, and that each member understood from that information that it could use [the model arbitration clauses] without fear of losing business to other brokers because all brokers would necessarily use [the model clauses] as nonnegotiable contract terms.

1.

Section 1 of the Sherman Act[22] proscribes "[e]very contract, combination... or conspiracy [] in restraint of trade or commerce . . . . " 15 U.S.C. $ 1. In order to state a claim for a violation of Section 1, a plaintiff must allege (1) the existence of a conspiracy (2) affecting interstate commerce (3) that imposes an "unreasonable" restraint of trade. White & White v. Am. Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983). Contrary to SIA's assertions, Dillard alleged "the existence of a conspiracy" in several places in this complaint. For example, in paragraph 19, he charges a

> conspiracy by Defendants and their competitors in violation of the Sherman Anti-Trust Act by the Defendants in adopting and agreeing to use, and in using exclusively certain uniform contracts for securities trading containing provisions for the determination by arbitration of all claims and controversies arising under said contracts.

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[22] Dillard also brings a claim under section 2. His claim, however, is more appropriately considered under section 1.

Dillard goes on to allege that the defendants "acted with the intention that services be unavailable except on similar unfair terms." Essentially, Dillard asserts that SIA disseminated information about the use of arbitration clauses; from that dissemination, he argues, each member of the SIA understood that it could use the arbitration clause in its contracts without fear of losing business.[23]

SIA argues that Dillard alleges nothing more than "conscious parallelism" in the industry, which is not enough to state a claim for conspiracy. In particular, Dillard states that he "will

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[23] He models his complaint after Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930), in which competitors in the film industry agreed to use a standard form contract containing an arbitration clause in their dealings with movie theaters. If a theater owner failed to submit disputes to an industry-controlled arbitration panel, or if he refused to abide by an arbitration award, the industry conspirators would refuse to do buiness with him again until he put up a security deposit, arbitrated the dispute, or abided by the arbitration award.

show the similarity of behavior can, under the facts, only be attributed to an understanding among securities industry competitors to effect the restraint." SIA is correct when it asserts that proof of parallel business behavior is insufficient to prevail on a Sherman Act claim. See Theatre Enters. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954). But SIA seems to confuse the standard for withstanding summary judgment with the standard for defeating a rule 12(b)(6) motion.

Dillard does not need to "off[er] any plausible reason for defendants to have conspired," as SIA suggests. He merely needs to allege that they did indeed conspire and give some factual allegations that would support such a claim. See McCleneghan v. Union Stock Yards Co., 298 F.2d 659, 663 (8th Cir. 1962) (plaintiff needs to make more than an allegation of conspiracy; he must make a statement of

facts constituting the conspiracy). Dillard does this by alleging that the defendants attended seminars and conferences at which arbitration clauses were discussed and that they adopted such clauses knowing that they could do so without fear of competition.

2.

Section 4 of the Clayton Act, which provides the private right of action to enforce the Sherman Act, requires that the antitrust plaintiff seek recovery for injury "in his business or property." 38 Stat. 731, as amended, 15 U.S.C. § 15(a). Dillard alleges that [t]here has been injury to MR. DILLARD'S business and to his property because of duress of threat to restrain trade of Plaintiff lest he sacrifice right of recovery by judicial determination . . . ." SIA argues that the dismissal for failure to state a claim was proper because Dillard "alleged no facts to show how he has been economically damaged.

Contrary to SIA's suggestion, Dillard need not show how he was damaged at this point, however. The fact is that he alleged that his business and property were injured. This is sufficient to satisfy the requirements of notice pleading.[24] We therefore reverse the district court's dismissal of SIA for failure to state a claim against it.[25]

B.

Judge Hughes abated the claims against Merrill Lynch "until Dillard moves to, and receives a negative ruling on a motion to, amend his complaint" in the 1985 case to add the claims asserted in his 1988 complaint. In his 1985 complaint, Dillard

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[24] SIA does not contest the sufficiency of Dillard's complaint as to pleading unreaonable retraint or interstate commerce; thus, we do not consider these issues.

[25] We leave it to Judge Huqhes on remand to survey the procedural landscape of this case and to decide whether Dillard's claim against SIA should go forward in his or another court.

alleged that Merrill Lynch violated the federal securities laws as well as the DTPA. In that complaint he did not state claims arising from the criminal prosecution or in connection with the alleged antitrust conspiracy (Judge Lake refused to consider Dillard's antitrust allegations as a separate cause of action because he did not properly raise them in his pleadings.)

It was within Judge Hughes's discretion to abate the claims pending in his court with the hope that Dillard would consolidate all his claims against Merrill Lynch in one forum. We have expressly noted in the past that a stay[26] "pending the outcome of litigation between the same parties involving the same or controlling

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[26] An abatement can be either a stay or a dismissal. Baer v. Fahnetock & Co., 565 F.2d 261, 263 (3d Cir. 1977). In this case, the abatement should be considered a stay, given that Judge Hughes abated the case only until the occurrence of a specific event -- Dillard's attempt to add his 1988 claims to the 1985 case.

issues is an acceptable means of avoiding unnecessary du[illegible]tion of judicial machinery." ACF Indus. v. Guinn, 384 F.2d 15, 19 (5th Cir. 1967), cert. denied, 390 U.S. 949 (1968).

At the time of Judge Hughes's order, Dillard had filed a motion to amend the judgment in the 1985 case that raised the antitrust claims but not the claims related to the criminal prosecution; the latter were, however, raised in the first amended complaint in the 1986 case. Since that time, Judge Lake has denied the motion to amend judgment in the 1985 case. He also refused to allow Dillard to add Merrill Lynch to the 1986 case on the ground that Dillard failed to ask leave of court to add new defendants. The question is, then, whether Dillard has complied with Judge Hughes's request.

Merrill Lynch correctly points out that Dillard never attempted to file a motion to amend his 1985 complaint. Dillard's motion to amend judgment in that

case (which raised only the antitrust claims) was pending at the time, however. Considering Dillard is pro se, this is enough for substantial compliance with Judge Hughes's request.

Similarly, Dillard attempted to add Merrill Lynch to his 1986 case, in which Dillard's claims stemming from the criminal prosecution were pending. Judge Hughes, however, had asked him to amend his 1985 complaint. Again, especially considering that both the 1985 and the 1986 cases are assigned to Judge Lake, this appears to be substantial compliance. In sum, we affirm Judge Hughes's abatement of the case. Because Dillard substantially complied with Judge Hughes' request, he is free to return to Judge Hughes's court with his claims. At that time, Judge Hughes can survey the procedural landscape and make further orders, if necessary.

C.

It was within Judge Hughes's discretion to abate the case against Jenkens & Gilchrist pending a decision on Dillard's motion to amend his complaint in the 1986 case to add it as a defendant. Dillard did attempt to add Jenkens & Gilchrist, but his request was denied because he failed to seek leave of court to file a motion to add new party defendants. Again, considering Dillard is pro se, he has substantially complied with Judge Hughes's order. Dillard is now free to return to Judge Hughes's court with his claims against Jenkens & Gilchrist, and Judge Hughes may make further orders as appropriate.

D.

Judge Hughes dismissed the claims against Security Pacific Corporation, Security Pacific Brokers, Inc., and FCSC, reasoning that all the claims were still pending in the 1986 case. At the time of

Judge Hughes's decision, the following had occurred in the 1986 case: We had affirmed the district court's dismissal of Dillard's claims relating to the trading transactions as res judicata; Dillard had filed his supplemental complaint on remand; Judge DeAnda had stricken the supplemental complaint for failure to request leave of court to file it; and Judge Lake had granted a stay pending the first appeal of this (the 1988) case. Dillard had not yet filed his first amended complaint, and when he did so later, he did not raise any antitrust claims against the Security Pacific entities. Thus, Judge Hughes was incorrect in his assumption that all Dillard's claims against Security Pacific were pending in the 1986 case; the antitrust claims were not.

We assume that Judge Hughes's dismissal was with prejudice.[27] The effect of Judge Hughes's dismissal of the Security Pacific entities is to preclude Dillard from adding the antitrust claims to the 1986 case. We therefore reverse the dismissal of the antitrust claims as an abuse of discretion. A more appropriate course of action would have been to abate the antitrust claims against the Security Pacific entities until Dillard sought and obtained a negative ruling on a motion to amend his 1986 complaint.

With regard to Dillard's duplicative claims (i.e., those brought against Security Pacific in both the 1986 and the 1988 cases), it was within Judge Hughes's broad discretion to stay them pending the outcome of the 1986 case or to dismiss them

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[27] This is because Judge Hughes did not state otherwise. In addition, Security Pacific assumes that the dismissal was with prejudice, as it argues alternative ground for affirming the dismissal with prejudice, such as statute of limitations and res judicata.

without predjudice. See West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721, 729 & n.1 (5th Cir. 1985). See also First City Nat'l Bank & Trust Co. v. Simmons, 878 F.2d 76, 80 (2d Cir. 1989) (affirming dismissal without prejudice).[28] Dismissal with prejudice, however, would be an abuse of discretion. The 1986 case would have no res judicata or collateral estoppel effect on the 1988 case until it

[28] The West Gulf and First City cases deal with the so-called first-to-file rule, which comes into play when a plaintiff files similar lawsuits in two different federal districts. We have held that to avoid duplicative litigation, "a district court may dismiss an action where the issue presented can be resolved in an earlier-filed action pending in another district court." West Gulf, 751 F.2d at 729. The first-to-file rule hold that "[i]n the absence of compelling circumstances, the Court initially seized of a controversy should be the one to decide whether it will try the case." 909 Corp. v. Village of Bolingbrook Police Pension Fund, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990) (citation omitted). The same concern with avoiding duplicative litigation is present where similar suits have been filed in two courts within the same district, as is the case here.

came to final judgment, which it had not at the time of Judge Hughes's order; thus, dismissal with prejudice was improper.

Security Pacific would like us to affirm the dismissal because Dillard could have brought all his claims (including the antitrust claim) in the first amended complaint in the 1986 case. This reasoning does not lead to a dismissal with prejudice, however; instead, it argues for an abatement, stay, or dismissal without prejudice. Again, we leave it to Judge Hughes to evaluate the status of Dillard's litigation and make further orders, if necessary.

V.

Dillard has filed several motions to consolidate his cases all of which have been denied. Consolidating actions in a district court is proper when the cases involve common questions of law and fact and the district court finds that it would avoid unnecessary costs or delay. St.

Bernard Gen. Hosp. v. Hosp. Serv. Ass'n, 712 F.2d 978, 989 (5th Cir. 1983), cert. denied, 466 U.S. 970 (1984); Fed. R. Civ. P. 42. The power of the district court to consolidate is purely discretionary. St. Bernard, 712 F.2d at 989. We therefore affirm the various denials of Dillard's motions to consolidate. Given consolidation of the three cases on appeal, however, we suggest that Dillard renew his request for consolidation with the district courts in the 1986 and 1988 cases. See e.g., St. Bernard, 712 F.2d at 990 (asking the district court to reconsider - although not reversing for abuse of discretion -- its denial of motion to consolidate antitrust cases).

VI.

In summary, in the 1985 case, we AFFIRM the district court in all respects. In the 1986 case, we AFFIRM the district court in all respects except for the dismissal of the defamation, malicious

prosecution, and abuse of process claims; with regard to those claims, we REMAND for consideration of the "relation back" issue if that issue was properly raised. In the 1988 case, we REVERSE the district court's dismissal of SIA; REVERSE the dismissal with prejudice of the Security Pacific entities; AFFIRM the abatement of claims against Merrill Lynch and Jenkens & Gilchrist; and REMAND the case for further consideration. We also DENY Dillard's other requests and motions, including his motion for sanctions. Finally, we emphasize that in remanding we express no view regarding whether any of Dillard's claims are meritorious.

CIVIL DOCKET SHEET
H-85-4135

PLAINTIFF	DEFENDANT
C. G . DILLARD	MERRILL, LYNCH, PIERCE, FENNER & SMITH, Inc.

DATE	NR.	PROCEEDINGS
7-16-85	1	ORIGINAL COMPLAINT, filed.
7-16-85		SUMMONS (1) issued to deft.
7-25-85	2	RETURN SUMMONS served to Deft on 7-18-85, filed. rj Dkt'd 7-26-85
8-16-85	3	Deft's MOTION TO DISMISS Pltfs' Complaint, or in the Alternative, FOR A MORE DEFINITE STATEMENTS, filed. rj Dkt'd 8-19-85 M/D Aug 26, 1985 by Counsel.
8-16-85	4	Defts' MEMORANDUM In Support of Motion to Dismiss, filed. rj Dkt'd 8-19-85
8-27-85	5	Deft's Motion for Stay Pending Arbitration & Motion to Compel Arbitration, filed, kk dkt'd 8-28-85 OPPOSED M/D by clerk Sep 23, 1985
8-27-85	6	Defts' Memorandum of Law In Support of Motion for Stay pending Arbitration and Motion to Compel Arbitration, filed, kk dkt'd 8-28-85
8-29-85	7	Deft's Addendum to Deft's Motion for Stay Pending Arbitration and Motion to Compel Arbitration, filed, kk dkt'd 8-30-85

8-23-85	8	Pltf's Motion for Leave to Amend Complaint, filed, kk dkt' 9-5-85 (No stmt) M/D by clerk Sept 23, 1985
8-27-85	9	Deft's RESPONSE to Pltf's Motion for Leave to Amend Complaint, filed kk dkt'd 9-5-85
9-3-85	10	Pltf's RESPONSE to Deft's Motion for Stay and to Deft's Motion to Compel Arbitration and In Support of Pltf's Motion to Amend Complaint, filed, kk dkt'd 9-5-85
9-5-85	11	Deft's REPLY to Pltf's Response to Deft's Motion for Stay and to Deft's Motion to Compel Arbitration, filed, kk dkt'd 9-6-85
9-11-85	12	Pltf's REPLY to Deft's Reply to Pltf's Response to Deft's Motion for Stay and to Deft's Motion to Compel Arbitration, filed, kk dkt'd 9-12-85
9-11-85	13	Pltf's Motion to Declare Compulsory Arbitration Provisions of Deft's Adhesion Contracts to be Invalid, and Unenforceable and to Enjoin Enforcement of Same, filed, kk dkt'd 9-12-85 OPPOSED M/D by clerk Oct 7, 1985

9-19-85	14	Deft's MEMORANDUM in Opposition to Pltf's Motion to Declare Compulsory Arbitration Provisions of Deft's Adhesion Contracts to Be Invalid, and Unenforceable and to Enjoin Enforcement of Same, filed, kk dkt'd 9-20-85
9-27-85	15	Pltf's MEMORANDUM in Support of Pltf's Motion to Declare Compulsory Arbitration Provisions of Deft's Adhesion Contracts to be Invalid and to Enjoin Enforcement of Same, filed, kk dkt'd 9-30-85
11-1-85	16	(JVS) NOTICE, setting Motion/Scheduling conf on 3-17-85 @ 10:00am, filed. Parties ntfd. mb/mcs Dkt'd 11-5-85
11-22-85	17	Pltf's Motion to Compel Deft to Answer Complaint and motion to Move that the Court Shall Rule on all Outstanding Motion on Dec 2, 1985 filed, dwt (opposed) M/D by clerk Dec 9, 1985 Dktd 11-25-85
11-27-85	18	Deft's MEMORANDUM in Opposition to Pltfs' Motion to Compel Deft to Answer Complaint, filed, kk dkt'd 12-2-85
12-9-85	19	Pltf's Proposal For Settlement, filed, dwt Dktd 12-10-85

2-27-86	20	Notice of Resetting - mailed to all counsel. mb/db Case is reset to Jun 16, 1986 at 11:00 a.m. For Motion & Scheduling Conference. dkt'd 3-4-86
4/24/86		Case transferred to Judge Sterling in exchange for H-85-2947. Parties ntf'd jr dkt'd 4/30/86
7/10/86	21	Pltf's MOTION FOR JUDGMENT BY DEFAULT JUDGMENT, filed. jr M/D Aug 4, 1986, by clerk. dkt'd 7/11/86
7/23/86	22	Deft's MEMORANDUM in Opposition to Pltf's Motion for Judgment by Default, filed. jr dkt'd 7/24/86
8-15-86	23	Pltf's MEMORANDUM SHOWING ADDITIONAL DEFAULT BY DEFT, filed, jgm Dktd 8-16-86
2-2-87	24	Pltf's MOTION TO COMPEL deft to Answer 1st Amended Complaint because of 1934 Act Claims, filed. M/D Feb 23, 1987 by clerk. dkt'd 2-5-87
3/30/87	25	TRANSCRIPT OF PROCEEDINGS on March 23, 1987, before Judge Sterling, filed. jr (LOOSE IN FILE) dktd 4/1/87
3/23/87		(RNS) MOTION CONFERENCE, minutes filed. jr (Rptr: J. Schaefer Appearances: C.J. Dillard, pro se: Karl Stern f/deft 1. Pltf's Motion for leave to Amend GRANTED. Pltf's First Amended Complaint is

		considered Filed. 2. Pltf's Motion for Default is DENIED. 3. Pltf Sec. 17a claims dismissed 4. Pltf has not adequately plead R.106-S. Case STAYED pending arbitration. 5. Deft to submit copy of the ordr. rec'd and dkt'd 4/6/87
4/10/87	27	Pltf's MOTION FOR TRIAL BY JURY RESTRICTED TO SPECIFIC ISSUE OF THE ARBITRATION AGREEMENT, filed. jr (OPPOSED) M/D 4/20/87 by counsel dkt'd 4/13/87
4/20/87	28	Pltf's ADDENDUM to pltf's Motion for Trial by Jury Restricted to Specific Issue of the Arbitration Agreement, filed. jr dktd 4/22/87
2/11/88	29	Pltf's MOTION FOR FINDING OF FACT AND CONCLUSION OF LAW CONCERNING INJUNCTIVE RELIEF AND OTHER PREVIOUSLY FILED MOTIONS, filed. jl dktd 2-16-88
3-4-88	30	DEFTS RESPONSE TO PLTF'S MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING INJUNCTIVE RELIEF AND OTHER PREVIOUSLY FILED MOTIONS, filed. jlp dkt'd 3-9-88 w/exhibits
4-11-88	31	(KKB) ORDER, filed. Parties ntfd. jl Case is transferred to docket of U.S. Magistrate G.A. Kelt, Jr. A status conference will be set at a later date. dktd 4-12-88

8-22-88	32	Pltf's PETITION TO THE CHIEF JUDGE, filed. jl Dktd 8-23-88 (with request for Hearing Sep 21, 88 before Judge DeAnda)
9-8-88	33	(JDA) ORDER, filed. Parties ntfd. jl Pending is Pltf's Petition to the Chief Judge, which Court construes to be a motion to consolidate this action with H-86-3251 and H-88-2848. Motion should properly be directed to Hon. G.A. Kelt, Jr. dktd 9-13-88 jl
12-19-88	34	(GAK) ORDER, filed. Parties ntfd Pltf's Motion to consolidate DENIED. dktd 12-19-88 rt
4-20-89		Rec'd & fwd to crd COPY OF LETTER re. Odom not attny of record for pltf. Dillard listed as pro se. jlp EOD 4-21-89
4-7-88		Case referred to Judge Kelt for hearing on outstanding motions. dm/kg
5-30-89	35	Pltf's NOTICE OF CONSOLIDATED APPEAL to order removal of stay pending arbitration, filed. bw dkt'd 6-2-89
5-30-89		Filing & Docketing Fees BOTH Paid. (Rec't 327485) bw
6-15-89	36	Pltf's DESIGNATION OF RECORD OF CONSOLIDATED APPEAL, filed. bw (Entire File)
6-29-89	37	Pltf's TRANSCRIPT ORDER FORM advising that the transcript is already on file in the Clerk's Office, filed. bw dkt'd 7-14-89

7-5-89	38	Pltf's Addenda to Notice of Consolidated Appeal and Notice of Appeal under 29 U.S.C. Section 1292 (S) Motion for Permission to Appeal Under 29 U.S.C. Section 1292 (B), filed. bj eod 7-20-89
8-16-89	39	Certified copy of ORDER by Court of Appeals on Aug 9, 1989, DISMISSING the Appeal and Pltf's request for removal of the stay and for injunctive relief are DENIED as moot, filed. mac
9-6-89	40	(SL) ORDER, entered. Parties ntfd. dj Parties to file, w/i 30 days, an agreed statement describing the status of arbitration & when it will be concluded.
10/6/89	41	REPORT on Status of Arbitration, filed eod 10/10/89 jd
10-11-89	42	C. G. Dillard's RESPONSE to The Courts Order of Sept. 6, 1989, filed. eod 10-16-89 mf
10-30-89	43	Certified copy of ORDER by CCA DENYING the petition for rehearing and the pltf's request that the CCA treat his notice of appeal as a petition for writ of mandamus is DENIED, filed. km

2/1/90	44	(SL) ORDER, entered, Parties ntfd. br Parties are Ordered to begin arbitration w/i 30 days of the entry of this Order, & this action is DISMISSED w/o prejudice. 2/1/90 br
2/1/90	45	(SL) FINAL JUDGMENT, entered. Parties ntfd. This action is DISMISSED. This is a FINAL JUDGMENT. 2/1/90 br
2/14/90	46	Pltf's RULE 59 MOTION TO ALTER & AMEND the Courts Orders of Feb. 1 & Feb. 2 & Alternative Motion f/Stay, filed. M/D 3/6/90 EOD 3/2/90 br
2/14/90	47	Pltf's MOTION FOR TRIAL by Jury, filed. M/D 3/6/90 EOD 3/2/90 br
4-2-90	48	Bill of Cost of Deft. Merrill Lynch, Pierce, Fenner, Smith, Inc. And Memorandum In Support Thereof And Affidavit of Karl S. Stern, filed. eod 4-9-90 hs
8/6/90	49	(SL) ORDER, entered. Parties notified. Pltf's mtn to alter and amend Court's orders of 2/1 and 2/2 and alt mtn for stay (# 46) and pltf's mtn for trial by jury (#47) are DENIED. cj
8-13-90	50	Pltf's NOTICE OF CONSOLIDATED APPEAL from the Orders entered on 2-1-90, 2-2-90 and 8-6-90, filed. (fees not paid) km

8-20-90	Mailed notice Of filing appeal to all parties and CCA. km
8/24/90	Filing and docketing fees PAID #354299, $105.00. Parties notified. jd
10-16-90	RECORD ON APPEAL consisting of all original instruments forwarded to the CCA. (2 volumes of record and 1 volume of transcript) km

Date of Entry: October 5, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff	$	CIVIL ACTION
	$	NUMBER H 85-4135
v.	$	
MERRILL, LYNCH, PIERCE,	$	
FENNER & SMITH, INC.,	$	
	$	
Defendant	$	

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now C. G. Dillard, Plaintiff herein complaining of Merrill, Lynch, Pierce, Fenner & Smith, Inc., Defendant herein, and for cause of action, Plaintiff would show the Court as follows:

1. Plaintiff, C. G. Dillard, a small investor and speculator, a consumer of services provided by the defendant in Houston, Harris County, Texas.

2. Defendant Merrill, Lynch, Pierce, Fenner & Smith, Inc., is corporation organized under the laws of another state which does business in Houston,

Harris County, Texas as well as other locations and it may be served with process by way of its Resident Vice-President, Steven A. McAnally, at its offices at 12 Greenway Plaza, #200 Houston, Texas 77046.

Jurisdiction and Venue

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. #1332 (A) (1) because it is a civil action between citizens of different states where the-amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

4. Venue is proper in this District pursuant to 28 U.S.C. #1391 (A) because the claim arose here.

Facts

5. Plaintiff has for several years maintained an account with Defendant for the purpose of trading in stocks, options, bonds and other securities at

Defendant's offices at Greenway Plaza, Harris County, Texas. (location at which untrue statement of material fact was made).

6. Plaintiff had, at considerable expense, acquired the right to purchase 52,000 shares of Superior Oil Company ("SOC") at $35 per share. These option contracts were exercised by Plaintiff on December 15,1983.

7. Plaintiff requested that the terms of his payment for the SOC shares be changed from payment due date of December 23,1983 to payment due date of December 29,1983. (the date fraud was proven to Plaintiff).

8. On December 23, 1983 (date of untrue statement of material fact), Plaintiff was told by Steven A. McAnally, representing Defendant, that payment on December 29, 1983 had been approved by the Self Regulatory Agency of the Exchange and by the Federal Securities and Exchange Commission and

that Defendant would also agree to December 29,1983 payment date, but only if Plaintiff purchased Guaranty Insurance from Defendant.

9. Defendant told Plaintiff that insurance was necessary to eliminate the hazard of economic loss to Defendant should the value of the stock decrease below what was owed and the Plaintiff fail to pay on December 29; if Plaintiff would agree to purchase from or through Defendant about $104,000 worth of puts which gave the holder the right to sell 52,000 shares of SOC at $35 per share; Defendant could suffer no loss as a result of the granting of the extension of payment and would, therefore, certainly deliver to Plaintiff exactly 52,000 shares of SOC on December 29, 1983 (untrue statement of material fact).

10. It was agreed by Plaintiff and

Defendant and Defendant did purchase for the account of Plaintiff 520 SOC March 17, 1984 expiration $35 puts as insurance to guarantee and warranty their mutual contract for payment for and delivery of the 52,000 SOC shares.

11. Defendant promised to hold both puts and stock in trust in Plaintiff's account until December 29, 1983. On December 27, 1983, Defendant told Plaintiff that it was taking some of the 52,000 shares of SOC from Plaintiffs account and was selling them for the purpose of settling and unrelated transaction.

12. Plaintiff pointed out to Defendant that equity in Plaintiff's accounts was sufficient so that no liquidation was necessary to reasonably protect Defendant from loss; and Plaintiff cited to Defendant terms of contract and explained damages that would certainly result if all 52,000 shares of stock were not

delivered to Plaintiff on December 29, 1983. Plaintiff's objections were ignored and Defendant sold some of the stock.

13. Plaintiff hand delivered a letter to Defendant prior to the opening of the market on December 28 and watched Steven D. McAnally read the letter. The letter protested the wanton and capricious damage done by the partial sale of the previous day and the letter demanded that no additional SOC shares be sold.

14. Defendant continued to sell more of Plaintiff's SOC shares after the market opened on December 28, exhibiting reckless, highly unreasonable conduct and a carelessness approaching indifference.

15. Although Plaintiff's SOC stock was only partially liquidated, Defendant's actions prevented the on-time delivery and the beneficial use

of the 52,000 shares of SOC which had been guaranteed by Defendant to Plaintiff. Loss to Plaintiff was caused by Plaintiff's reliance on deception by Defendant and Plaintiff's reliance was justified due to previous history of much more thinly margined trades. Plaintiff had arranged by previous written contract with a third party the sale of the 52,000 shares of SOC. In order to execute the contract, it was imperative that all 52,000 shares be available on the mutually agreed date: December 29, 1983. As a direct result of Defendant's unconscionable actions, fraudulent representations, intentional misconduct, material misstatements and gross negligence, Plaintiff was unable to complete the sale of the stock on December 29, 1983 as per the terms of the third party contract.

16. Sale under the terms of the third party contract specified revenues to Plaintiff of at least $250,000 more than Defendant credited to Plaintiff's account as a result of Defendant's liquidations of the SOC stock. In addition to the aforementioned $250,000 loss, Plaintiff lost in excess of another $250,000 in direct losses because of purchases of Superior Oil Company stock and Superior Oil Company stock options from or through Defendant (losses total over $500,000).

17. Defendant did illegally, unilaterally, award itself over $6,500 in extra commissions out of Plaintiff's account. Under captive customer conditions Defendant did grant itself commission increases out of Plaintiff's funds, which had been entrusted to Defendant's care, in an eleventh hour attempt to loot Plaintiff's account before it passed

from Defendant's control. After receipt of copy of letter from Plaintiff to Steven D. McAnally dated December 28, 1983 (the second letter to Defendant from Plaintiff of that date) Thomas W. Taylor, Vice President of Merrill Lynch, Pierce, Fenner and Smith, Inc. did confer with Plaintiff on December 28 by telephone; Thomas W. Taylor did then apologize profusely for the commission increase because he had negotiated the long standing contract with Plaintiff and he had recently reconfirmed the commission structure when Plaintiff had told Thomas W. Taylor that Plaintiff was considering changing brokerage houses. Thomas W. Taylor then said to Plaintiff that he was helpless to prevent or rescind the increase in commissions; although he then confirmed the legal contract rate as well as the illegal overcharges.

18. In order to facilitate the fraud Defendant did use instruments of transportation and communication in interstate commerce including the mails.

Causes of Action

19. Violation of Section 17(A) (1) (2) and (3) of The Securities Act of 1933.

20. Violation of Section 10 (B) of The Securities Exchange Act of 1934.

21. Violations of law stipulated in 15 U.S. C.S. Section 78 J (B) and under S. E. C. Rule 10 B-5. Plaintiff wishes to join state law violation with Rule 10 B-5 claim: State law remedies are available and facts shown make out prima facie case for state relief under the provisions of Texas Business and Commercial Code, Section 17.41 et seq. The acts and practices of Defendant as herein described are prohibited by this statue: The Texas Deceptive Trade Practices - Consumer

Protection Act ("D.T.P.A.").

A. Plaintiff resides in Harris County, Texas, and is a "consumer" as that term is defined in Section 17.45 (4) of the D.T.P.A.

B. Defendant does business in Harris County, Texas, and sold services to Plaintiff in Harris County, Texas, which services are covered by the D.T.P.A. Defendant sold a service and a thing of value; their warranty was commodity, a thing of value. Insurance is a "Service" under the provisions of D.T.P.A. The Guaranty Insurance which the Defendant provided against any breach of the contract for delivery to Plaintiff of the 52,000 SOC shares was to protect an insurable interest for which Plaintiff paid valuable consideration in commissions to the Defendant as

well as the costs of the puts themselves.

C. The puts were not used for their agreed upon purpose which was to insure a December 29 delivery of exactly 52,000 SOC shares.

D. Defendant's unconscionable course or action resulted in a gross disparity between value received and consideration paid in a transaction involving transfer of consideration. Under D.T.P.A., such unconscionable action is a specific violation of the act.

E. Defendant also violated other sections of the D.T.P.A.:

17.46 B (2) Defendant caused confusion as to sponsorship

17.46 B (5) Defendant indicated approval uses and benefits that his service did not have

17.46 B (12) Defendant represented that agreement conferred rights,

remedies or obligations which it does not have or which are prohibited by law.

17.46 B (14) Defendant misrepresented the authority of a salesman, representative or agent to negotiate the final terms of a transaction.

17.46 B (23) Defendant failed to disclose information concerning goods or services which were known at the time of transaction and such failure to disclose was intended to induce the Plaintiff into a transaction the Plaintiff would not have entered had the information been disclosed.

22. The unlawful acts and practices of Defendant described herein were unconscionable, manipulative, deceptive and indicate a failure to act reasonably. Defendant's illegal actions were performed knowingly, adversely affected Plaintiff and were a

producing cause of damages to Plaintiff and Plaintiff seeks to recover the amount of money which, if paid in cash, would fairly and reasonably compensate Plaintiff for such damages. Plaintiff's damages include amounts of not less than $256,500, all of which is actual out of pocket cost to Plaintiff not counting any interest from time of loss or costs of litigation or any punitive or exemplary damages.

23. WHEREFORE, Plaintiff, C. G. Dillard, respectfully requests that the Honorable Judge of this Court declare that Defendant, Merrill, Lynch, Pierce, Fenner & Smith, Inc., must pay judgment in the amount of $256,500, plus prejudgment and postjudgment interest as provided by law, plus reasonable attorney's fees pursuant to Article 2226 of the Texas Revised Civil Statutes, for cost of

court and for such other further relief as Plaintiff may show himself to be justly entitled including: Pursuant to Section 17.50 B (1) of the Texas Deceptive Trade Practices - Consumer Protection Act, Plaintiff is entitled, as a matter of law, to obtain from defendant three times the amount of Plaintiff's damages as herein described.

Respectfully submitted,

C. G. DILLARD, PLAINTIFF
120 Tuam Street
Houston, Texas 77006
(713) 520-6807

Date of Entry: March 23, 1987

COURTROOM MINUTES

(RNS) MOTION CONFERENCE
Date: March 23, 1987

C.A. No. H-85-4135

Court Reporter: Joyce Schaefer
Law Clerk: Bob Davee
Time: 4:30 / 5:30

Appearances:
Pltf(s) = C. J. Dillard, pro se

Deft(s) = Karl Stern

DOCKET ENTRY: Pltf's motion for leave to amend GRANTED.

Pltf's First Amended Complaint is considered filed.

Pltf's motion for default DENIED.

Pltf's Sec. 17a claims dismissed.

Pltf has not adequately pled R.10b5. Case stayed pending arbitration.

Deft to submit copy of the order.

Date of Entry: April 11, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD	$	
	$	
PLAINTIFF	$	
	$	
v.	$	CIVIL ACTION NO: H-85-4135
	$	
MERRILL, LYNCH,	$	
PIERCE, FENNER &	$	
SMITH, INC.	$	
	$	
DEFENDANT	$	

MINUTE ENTRY

This case is to be transferred to the docket of United States Magistrate George A. Kelt, Jr. A status conference will be set at a later date.

DONE at Houston, Texas this 11th day of April, 1988.

KAREN K. BROWN
UNITED STATES MAGISTRATE

Date of Entry: September 8, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DILLARD	$	
	$	
VS.	$	CIVIL ACTION
	$	NO. H-85-4135
MERRILL LYNCH,	$	
PIERCE, FENNER AND	$	
SMITH, INC.	$	

ORDER

Pending before the Court in the above referenced cause is Plaintiff's petition to the Chief Judge, which the Court construes to be a motion to consolidate this action with two others, H-86-3251 and H-88-2848. This motion should properly be directed to the judge to whom the lowest numbered case is assigned, in the instant action to the Honorable G. A. Kelt, Jr.

DONE in Houston, Texas, this 8th day of September, 1988.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Date of Entry: December 19, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff	$	
	$	
v.	$	C.A. H-85-4135
MERRILL, LYNCH,	$	
PIERCE,	$	
FENNER & SMITH, INC.,	$	
	$	
Defendant	$	O R D E R

Plaintiff's motion to consolidate this action with C.A. H-86-3251 and C.A. H-88-2848 filed on August 22, 1988, is DENIED. The cases do not present common questions of fact and of law.

The Clerk shall enter this Order and provide a copy to all parties.

DONE at Houston, Texas, on this the 13th day of December, 1988.

GEORGE A. KELT, JR.
United State Magistrate

Date of Entry: August 9, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2690
USDC #CA-H-85-4135

C.G. DILLARD,

Plaintiff-Appellant,

versus

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,

Defendant-Appellee.

Appeal from the
United States District Court
for the Southern District of Texas

Before JOLLY, JONES, and DUHE, Circuit Judges.

BY THE COURT:

This Court must examine the basis of its jurisdiction on its own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). Upon examining the district court's docket sheet in this securities action, we can discern no basis for appellate jurisdiction.

In this case, the plaintiff has filed a notice of appeal from an order of the district court staying the action pending arbitration. In an addendum to the notice of appeal, plaintiff requests permission to appeal pursuant to 28 U.S.C. $ 1292(b) and further states that he is, pursuant to 28 U.S.C. $ 1292(a), appealing the district court's refusal to grant injunctive relief.

Orders staying actions pending arbitration are not appealable prior to entry of final judgment unless certified for appeal pursuant to 28 U.S.C. $ 1292(b) or unless review is sought by a petition for writ of mandamus. See: Turboff v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 867 F.2d 1518, 1520 n.5 (5th Cir. 1989). In the present case, no final judgment has been entered and, although the plaintiff has requested permission to take an interlocutory appeal, he has failed to obtain certification from the district court as required by $ 1292(b). Moreover,

as to the matter of injunctive relief, no appeal is available because the district court has not ruled on the request for such.

APPEAL DISMISSED.

Plaintiff's requests for removal of the stay and for injunctive relief, brought presumably pursuant to Fed. R. App. P. 8, are DENIED as moot.

Date of Entry: September 6, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	CIVIL ACTION
	$	NO. H-85-4135
MERRILL LYNCH, PIERCE,	$	
FENNER & SMITH, INC.,	$	
	$	
Defendant.	$	

ORDER

On March 23, 1987, this action was stayed pending arbitration. The parties are to file within 30 days from the entry of this Order, with a copy to Chambers (Room 9535), an agreed statement describing the status of the arbitration, and in particular, when it will be concluded.

SIGNED at Houston, Texas, this 1st day of September, 1989.

SIM LAKE
UNITED STATES DISTRICT JUDGE

Date of Entry: October 26, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2690
USDC #CA-H-85-4135

C.G. DILLARD,

Plaintiff-Appellant,

versus

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,

Defendant-Appellee

Appeal from the
United States District Court
for the Southern District of Texas

Before JOLLY, JONES, and DUHE, Circuit Judges.

BY THE COURT:

Construing plaintiff's request for rehearing and to suspend the rules as a petition for rehearing pursuant to Fed. R. App. P. 40, the petition for rehearing is DENIED.

Moreover, plaintiff's request that we treat his notice of appeal in this action as a petition for writ of mandamus is DENIED for lack of compliance with Fed. R. App. P. 21 and Fifth Circuit Loc. R. 21.

Date of Entry: February 1, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	CIVIL ACTION
	$	NO. H-85-4135
MERRILL LYNCH, PIERCE,	$	
FENNER & SMITH, INC.,	$	
	$	
Defendant.	$	

ORDER

This action was stayed pending arbitration in accordance with the Court's Order of September 6, 1989. Before the Court are the plaintiff's "Response to the Court's Order of September 6, 1989," (#42) and plaintiff's "Motion for Findings of Fact and Conclusions of Law Concerning Injunctive Relief and Other Previously Filed Motions" (#29) to refuse to submit to arbitration.

C. G. Dillard, plaintiff, filed his Complaint (#1) against defendant Merrill Lynch, Pierce, Fenner & Smith, Inc.

("Merrill Lynch") on July 16, 1985. He alleges diversity jurisdiction, although he doesn't specify where Merrill Lynch is incorporated or where its principal place of business is located.

Plaintiff alleges that Merrill Lynch committed certain fraudulent acts in handling securities transactions on his behalf. In particular, plaintiff claims that he was required by Merrill Lynch to purchase Superior Oil Company (SOC) put options as a "Guarantee Insurance" in order to receive 52,000 shares of SOC on December 29, 1983, at which time he would pay for the shares. Plaintiff alleges that Merrill Lynch partially liquidated his SOC options on December 27 and 28, 1983, over the express objections of the plaintiff. Plaintiff claims that this sale caused him $250,000 in lost revenues because it prevented the completion of a previous contract to sell 52,000 shares of SOC to a third party. Plaintiff claims that his loss

was a direct result of defendant's "unconscionable actions, fraudulent misrepresentations, intentional misconduct, material misstatements and gross negligence." (Complaint at p. 5). Plaintiff also claims that he had to pay $6,500 in commissions that were illegal that Merrill Lynch unilaterally awarded itself.

Plaintiff alleges in his Complaint that these actions were in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 71j(b) and rule 10B-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, and the Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE § 17.41 et. seq., and § 17(a) of the Securities Act of 1933, 15 U.S.C. § 771(2). (Section 17(a) of the 1933 Act was substituted for § 12(2) in plaintiff's First Amended Complaint (#9) because the statute of limitations had expired on § 12(2).) Plaintiff later filed several motions requesting a default judgment against the defendant when defendant never

filed an answer. In lieu of filing an answer defendant filed a Motion to Dismiss Plaintiff's Complaint, or in the Alternative, for a More Definite Statement (#3) on August 16, 1985. Defendant claimed that plaintiff had not complied with Fed. R. Civ. P. 9(b), which requires the circumstances constituting a fraud to be stated with particularity. Defendant also asserted that plaintiff's claim under $ 12(2) of the 1933 Act was not commenced within the required period of limitation.

On March 23, 1987, the late Judge Ross Sterling held a motion conference at which he ruled on the parties' motions, including defendant's Motion for Stay Pending Arbitration and Motion to Compel Arbitration (#5). Judge Sterling granted Plaintiff's Motion for Leave to Amend, but dismissed plaintiff's claims under $ 17(a) of the 1933 Act because there is no private right of action under $ 17(a). He also held that plaintiff had not adequately pled his

fraud allegations to maintain a $ 10B-5 claim. Plaintiff's Motion for Judgment by Default (#21) was denied because defendant had filed the Motion to Dismiss. Judge Sterling then stayed the case pending arbitration, holding any remaining claims to be arbitrable. (Although Judge Sterling died without memorializing his rulings in an order, they are reflected in the hearing transcript, Docket Entry #25.) This Court concurs with Judge Sterling's finding of a contract requiring arbitration. No claim has been made in plaintiff's Complaint or First Amended Complaint that creates any question of law, equity or fact that cannot be arbitrated. Plaintiff's motions objecting to arbitration on the grounds of federal anti-trust law or adhesion contracts are irrelevant because they are beyond the scope of his pleadings. After careful consideration, plaintiff's "Response to the Court's Order of September 6, 1989," and "Motion for Findings of Fact and Conclusions of Law Concerning

Injunctive Relief and Other Previously Filed Motions" are DENIED.

The parties are ORDERED to begin arbitration within 30 days of the entry of this Order, and this action is DISMISSED without prejudice.

SIGNED at Houston, Texas, this 29th day of January, 1990.

SIM LAKE
UNITED STATES DISTRICT JUDGE

Date of Entry: February 2, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	CIVIL ACTION
	$	NO. H-85-4135
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,	$	
	$	
	$	
Defendant.	$	

FINAL JUDGMENT

Pursuant to the Court's Order of today, this action is DISMISSED with costs taxed against the plaintiff.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, this 29th day of January, 1990.

SIM LAKE
UNITED STATES DISTRICT JUDGE

Date of Entry: August 6, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	CIVIL ACTION
	$	NO. H-85-4135
MERRILL LYNCH, PIERCE,	$	
FENNER & SMITH, INC.,	$	
	$	
Defendant.	$	

ORDER

Plaintiff's Rule 59 Motion to Alter and Amend the Court's Orders of February 1 and February 2 and Alternative Motion for Stay (Docket Entry No. 46) and Plaintiff's Motion for Trial by Jury (Docket Entry No. 47) are DENIED.

SIGNED at Houston, Texas, this 3rd day of August, 1990.

SIM LAKE
UNITED STATES DISTRICT JUDGE

Date of Entry: September 11, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C . G . DILLARD,	$	
	$	
Plaintiff,	$	
v.	$	NO. H-85-4135
MERRILL LYNCH, PIERCE,	$	
FENNER, SMITH, INC.,	$	
	$	
Defendant.	$	

PLAINTIFF'S MOTION TO DECLARE COMPULSORY ARBITRATION PROVISIONS OF DEFENDANT'S ADHESION CONTRACTS TO BE INVALID, AND UNENFORCEABLE AND TO ENJOIN ENFORCEMENT OF SAME

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW C. G. Dillard, Plaintiff in the above referenced action and files this Motion to Declare the Compulsory Arbitration Provisions of Defendant's Adhesion Contracts to be Invalid and Unenforceable because of grounds that exist in law and in equity and in that regard would respectfully show the Court the following:

1. The contracts in question are adhesion contracts: it is a standard form offered to plaintiff on a "Take it or Leave it" basis without affording realistic opportunity to bargain and under such conditions that plaintiff could not obtain the desired services except by acquiescing to the form contract. Plaintiff had no choice as to its terms. Assent was not voluntary, it was coerced by the advantage of defendant which was unlawfully exercised. Unlawful advantage of defendant consisted of threat to prohibit trade of plaintiff in securities. The threat constituted duress which induced plaintiff to sign the contracts contrary to plaintiff's will and to plaintiff's detriment. Defendant's threat of restraint of plaintiff's trade overcame plaintiff's will and liberty of discretion to such an extent as to influence plaintiff to act in a way that plaintiff's judgement and discretion would condemn and prompt him not to do, if free from such influence.

2. Defendant's exploitation of unfair advantage in exempting itself from much of the consequences of its own negligence and illegal acts amounts to unfair protection of the interests of defendant in so large a manner as to interfere with the public interest. If plaintiff had been afforded the option to choose protection under the law or arbitration then the arbitration provision would be enforceable. But compelling a consumer to renounce his protection under the law upon pain of denial of services is contrary to public policy. If the desired services could be obtained from another brokerage house then defendant might argue that plaintiff did not have to trade with it and therefore the duress was not so extreme as to force compliance. But brokerage house services currently are, and at the time of contract were, unavailable to any consumer unless that consumer signs a virtually identical compulsory arbitration provision.

3. There is a de facto conspiracy of brokerage houses to deprive buyers and sellers of securities of rights to due process and protection of law in securities transactions by restraint of trade and commerce in purchase and sale of securities. Every major brokerage house has conformed to a uniform pattern of conduct in compelling the execution of a contract containing a compulsory arbitration provision (plaintiff challenges defendant to name a single major brokerage house that does not). Plaintiff was unable to find any brokerage house large or small that does not impose upon its customers a contract stipulating compulsory arbitration as a precondition to doing any business. Therefore choice even at another brokerage house was impossible.

4. Agreement, combination or conspiracy may be inferred from course of dealings warranting conclusion that conspirators had common design, meeting of minds or acted in concert and uniform

participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is restraint of interstate commerce is sufficient to establish unlawful conspiracy under the Sherman Act (15 USCA $$ 1-7, 15). Plaintiff submits to the Court that defendant's actions are a violation of the Sherman Act in the manner just described. Please see: William Goldman Theaters, Inc. v. Loew's, Inc. (1945, Ca. 3 Pa.) 150 F2d 738.

5. The United States brought suit in the District Court of the United States for the Southern District of New York, attacking the contract in question or a similar one on the ground that it was in violation of the Sherman Anti-Trust Act (15 USCA $$ 1-7, 15). In an able opinion, Judge Thacher of that court held the arbitration clause of the contract to be unlawful as being in violation of the

Sherman Anti-Trust Act [United States v. Paramount Famous Lasky Corporation, 34 F. (2d) 984], and entered a decree enjoining the Paramount Famous Lasky Corporation, from acting under the arbitration clause in the contract. The opinion and decree of the District Court was affirmed by the Supreme Court of the United States (Paramount Famous Lasky Corporation v. U.S., 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed.

6. District Judge Thacher adjudged that:

"Trade or commercial groups or traders generally may voluntarily impose on themselves standard forms of agreement which do not unduly restrict competition and thus restrain trade, and may agree that all controversies should be settled by arbitration so long as such agreements are not sought to be imposed on others, regardless of their wishes, by coercive combinations having power to enforce their will.

In Equity. Suit by the United States against the Paramount Famous Lasky

Corporation and others to restrain conspiracy in restraint of trade. Decree for complainant.

In Equity. Suit by the United States under section 4 of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209 [15 USCA$4]) to enjoin the defendants from further engaging in a conspiracy in restraint of interstate trade and commerce, in violation of the section 1 of said Act. (15 USCA $ 1).

The conspiracy charged in this case is predicated upon acts of the defendants in adopting and agreeing to use, and in using exclusively, certain uniform contracts for the lease of motion picture films to theater owners throughout the United States, containing provisions for the determination by arbitration of all claims and controversies arising under said contracts.

...it had been the consistent policy of the distributors to refuse to deal with

exhibitors who failed to arbitrate....The coercive effect of this situation has undoubtedly been that, unless exhibitors submitted to arbitration...they have been unable to enter into new contracts.

...One can hardly imagine a more direct restraint upon trade than an agreement between competitors in an open market not to trade except upon terms which they have fixed in advance.

...In judging the inherent character of the restraint one must look not only to the restraint voluntarily imposed upon the competitive activities of those who are in the combination, but also to the involuntary restraint imposed upon the freedom of outsiders to engage in trade under natural and normal conditions. It is therefore not enough to say that competition between distributors is keen and active, or even that it has been promoted and enhanced by what has been done, if, in fact, it can be seen that the freedom of others to engage in trade, to

enter into normal commercial agreements, and to have recourse to the courts for their rights, has been unduly restrained by the coercive and collective action of the defendants. That competition between the distributors has been promoted by the adoption of the standard exhibition contract, and that in many ways general trade conditions have been vastly improved, I have no doubt and so find. But the record is equally clear that all this good has been accomplished through the exercise of irresistible economic force consolidated by combination in the hands of the distributors, who collectively control the available supply of films and by virtue of this control have imposed their will upon the industry. By agreement of these distributors exhibitors who were not represented in the adoption of the uniform contracts have been constrained to accept their terms regardless of their wishes, and by the compulsory system of arbitration,

sanctioned and enforced by the collective action of the distributors, have been constrained to perform the contractual obligations thus assumed. In fairness it cannot be said that the restraint imposed upon these exhibitors is voluntary because they accept and agree to be bound by the contracts. They can have none other, because the defendants have agreed that they shall not; and, unless something more than the mere acceptance of all they can get is shown, they must be said to have acted under an involuntary restraint, imposed and continued by the defendants to the end that the contracts shall be signed and their terms obeyed. That such coercive restraint upon the commercial freedom of an exhibitor, who was neither represented nor consulted with reference to the agreement to adopt the standard form of contract, is undue and unreasonable, both at common law and under the Sherman Act. I cannot doubt. Gains resulting from such restraints to the industry as a whole do not in the eyes of

the statute justify the vicarious sacrifice of the individual, even for the sake of bigger and better business. A state Legislature could not lawfully impose compulsory arbitration upon the motion picture industry. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280. Much less should it be within the power of a combination of practically all the distributors to do so by coercion exercised through control of the available supply of films.

...the restraint, if not shown to have been voluntary on both sides, is oppressive, and therefore undue and unreasonable.

...Nothing that has been said should be taken in derogation of the right of trade or commercial groups, or of traders generally, to voluntarily impose upon themselves standard forms of agreement

which do not unduly restrict competition and thus restrain trade, or to agree that all controversies arising between them shall be settled by arbitration. Such agreements dealing only with the rights of those who execute and intend to be bound by them are normal and usual, and are proper instruments in the lawful conduct of trade. It is only when such agreements are sought to be imposed upon others, regardless of their wishes, by coercive combinations having the power to say 'Take what is offered or get nothing,' that they become illegal."

7. H-85-4135 is indistinguishable from the Paramount Case in all essential elements concerning the arbitration clause.

8. Defendant's alleged right to force arbitration on all its customers whether they like it or not is in conflict with the Fourteenth Amendment to the United States Constitution, and deprives plaintiff of his property and liberty of contract without due process of law. For this and the other

reasons aforementioned plaintiff respectfully submits that defendant should be enjoined from acting under the arbitration clause.

WHEREFORE, Plaintiff C. G. Dillard prays that this Court enjoin defendant from attempt to enforce compulsory arbitration under the terms of the arbitration clauses in the adhesion contracts, which contracts have been previously submitted to the Court as Defendant's Exhibits I, II, III and IV.

Respectfully Submitted,

C. G. Dillard
120 Tuam St.
Houston, Texas 77006
(713) 520-6807

Date of Entry: February 14, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. Dillard	$	
Plaintiff	$	
	$	
v.	$	No. H-85-4135
	$	
MERRILL LYNCH, PIERCE	$	
FENNER & SMITH, INC.,	$	
Defendant	$	

MOTION FOR TRIAL BY JURY

Comes now, C.G. Dillard, Plaintiff herein and I do tell the court that request for jury trial has previously been made and I am filing this separate motion for same in order that there be no mistake and so that the jury request is abundantly apparent rather than buried in the pleadings where it might be missed.

It is therefore confirmed that I do request that this action be decided by jury under the provisions of the Seventh Amendment to the Constitution of the United

States of America.

Respectfully Submitted,

C. G. Dillard
118 Hoffman Way
Grants Pass, OR 97526
(503) 474-1565

Date of Entry: April 10, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. Dillard	$	
Plaintiff	$	
	$	
v.	$	No. H-85-4135
	$	
MERRILL LYNCH, PIERCE	$	
FENNER & SMITH, INC.,	$	
Defendant	$	

PLAINTIFF's MOTION FOR TRIAL BY JURY
RESTRICTED TO SPECIFIC ISSUE
OF THE ARBITRATION AGREEMENT

Comes now C.G. Dillard, plaintiff in the above referenced action, and files this Motion For Trial By Jury Restricted To Specific Issue Of The Arbitration Agreement. In support of this motion C.G. Dillard would respectfully show as follows: Plaintiff has repeatedly and unequivocally stated in his other pleadings in this case that there is no arbitration agreement between plaintiff and defendant. Plaintiff's signatures on the documents which defendant represents as being agreements to arbitrate were obtained by duress. No arbitration agreement exists

between plaintiff and defendant. Plaintiff can not be ordered into compulsory arbitration under the terms of a non-existent agreement. Prior to the court issuing any order to arbitrate there must be a finding of fact and law regarding the disputed agreement and said findings must be recorded in the record.

Questions as to validity of arbitration agreement is substantive question governed by federal rather than local law. Please see 9 U.S.C.A. Section 2; U.S.C.A. Const. Art. 1, Section 8, CL. 3; Art. 3, Section 2, CL. 1. it is clear that there must be judicial trial of the Federal Anti-Trust Law violations, Common Law and State Law violations and U.S. Constitution, Fourteenth Amendment violation. Said determinations must be made by jury before stay can issue pending arbitration. Please See: Robert Lawrence Co. v. Devonshire Fabrics, Inc. (1959, CA2 NY) 271 F2d 402, cert gr 362 US 909, 4 L ed

2d 618, 80 S. Ct. 682, cert dismd 364 US 801, 5 L ed 2d 37, 81 S Ct 27.

The Lawrence case shows that a violation of any law or condition precedent to fair bargain and binding contract in the making of the agreement to arbitrate voids the arbitration agreement and that a separate trial should be held in Federal Court to determine if law was violated in the making of the agreement to arbitrate voiding said agreement.

Under the provisions of 9 U.S.C.A. Section 2 the arbitration clause in the instant case is null and void because it's execution was induced by illegal compulsion by monopoly and restraint of trade in violation of substantive Federal Anti-Trust Law including provisions of the Clayton Act 15 U.S.C.S. Sections 12 et. seq. and the Sherman Act 15 U.S.C.S. Section 1 et. seq. also gross disparity in bargaining position, unequal bargain, use of duress, and use of coercion are evidenced in the circumstances surrounding the making of the

alleged agreement to arbitrate between plaintiff and defendant. The arbitration agreement is void because it is against public policy. Plaintiff hereby demands that defendant answer plaintiff's complaint that the arbitration clause is not valid nor enforceable. In order to demonstrate substance to the charge of invalid arbitration clause so that this issue can be promptly scheduled for trial plaintiff will show the court:

Under the provisions of Section 4 of the Clayton Act:

1. Plaintiff is a person within the meaning of the statute.

2. Plaintiff has alleged and can by the facts obviously establish that a violation of the Anti-Trust Laws has in fact occurred. See pleading.

3. The Anti-Trust Law violated is one within the meaning of Section 4, the Sherman Act.

4. There is injury to plaintiff's business

and to his property because illegal contract unreasonably restrained plaintiff from engaging in business of securities trading lest he sacrifice right of recovery by judicial determination of monies stolen by defendant. Property stolen by defendant from plaintiff is actually diminished in value as a result of the anti-trust violation because on the average only one half of monies illegally taken from it's customers are returned as a result of arbitration. Recourse under the law, will result in full recovery of defendant's property with appropriate damages in order to properly and legally compensate defendant for the illegal deprivation and theft. Under the law plaintiff will probably collect over one million dollars from defendant. But under arbitration, because of anti-trust law violation, the amount plaintiff would probably collect from defendant is only about one hundred fifty thousand dollars.

5. The direct result of defendants' Sherman Act violations is to deprive defendant of substantial monies currently due from defendant to plaintiff.

6. The certain result of defendants' wrongful behavior is to line it's own pockets with plaintiff's money, which money if not for the anti-trust law violation would be judicially commanded be paid to plaintiff. The anti-trust violation was done willfully and deliberately by defendant in order to prevent just recovery under the law of amounts it might steal. Under Section 1 of the Sherman Act combination and conspiracy with it's competitors in unreasonable restraint of trade is charged against defendant.

Under Section 2 of the Sherman Act monopolization of the securities brokerage business and conspiracy to monopolize is charged against defendant.

Plaintiff additionally charges conspiracy by defendant and its competitors in violation of the Sherman Anti-Trust Act

by defendant in it's adopting and agreeing to use, and in using exclusively certain uniform contracts for securities trading containing provisions for the determination by arbitration of all claims and controversies arising under said contracts.

A plurality, indeed almost every brokerage company has taken concerted action by consensus or agreement to act together with it's competitors to unreasonably restrain the trade of any who do not renounce their rights under the law and agree instead to arbitrate in an unfair forum set up by defendant and it's co-conspirators which is rife with conflict of interest. The disputed trades took place in a margin account and therefore proof of monopolization can be made by the total lack of opportunity to do anything but arbitrate disputes arising in each and every other of defendant's competitor's customer's margin accounts. To the best of plaintiff's knowledge and belief

monopolization in the aforementioned regard is 100%; all evidence to the contrary is statistically insignificant and by design generally unknown and unavailable to the consumer.

Plaintiff will show that the similarity of behavior can, under the facts, only be attributed to an understanding among securities industry competitors to effect the restraint; their motivation being to restrict available services to plaintiff so that he and others had no alternative but to sign unfair contract.

Defendant and it's co-conspirators in order to effect monopolization acted with the intention that services be unavailable except on similar unfair terms and legal seminars at trade associations and other exchanges of information on model arbitration clauses and their intent to use them caused each individual company to know that others would act in conjunction with it to restrain the trade of those who

refused to arbitrate. The brokerage companies contemplated the illegal action in illegal conspiracy through exchange of information and then executed the monopolization plan with full knowledge of it's probable anti-competitive effect.

The rule of reason dictates that we have here an unreasonable restraint of trade which by denial of necessary services by almost all of the providers of that service acts to deprive consumers of their property without recourse to the protection of law in violation of the Fourteenth Amendment to the United States Constitution. Indeed the arbitration clause acts as a fraudulent device by which the brokerage companies can steal and then hide their illegality in an unfair arbitration proceeding to which there is no appeal and no usable record for subsequent criminal prosecution.

The number of securities brokerage companies using the same arbitration clause

in their margin agreements is so excessive that it does in fact constitute a group boycott by concerted refusal to deal in order to coerce their customers into an unjust arbitration agreement which is illegal per se. Defendant's participation in group boycott is also illegal per se and plaintiff does specifically declare that the arbitration agreement in this case is void because of group boycott.

The adhesion arbitration agreements are invalid and unenforceable due to violations of law and equity which are grounds for the revocation of any contract.

The securities industry is acting in concert in violation of the Sherman Act; their securities brokerage monopoly acts to restrain the trade of any who refuse to arbitrate. No one can trade in securities on margin without renouncing their freedom of contract and renouncing the protection of law for their property --- rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The contracts in question are adhesion contracts: it is a standard form offered to plaintiff on a "Take it or leave it" basis without affording realistic opportunity to bargain and under such conditions that plaintiff could not obtain the desired services except by signing the form contract. Plaintiff had no choice as to its terms. Assent was not voluntary, it was coerced by the advantage of defendant which was unlawfully exercised. Unlawful advantage of defendant consisted of threat to prohibit trade of plaintiff in securities. The threat constituted duress which induced plaintiff to sign the contracts contrary to plaintiff's will and to plaintiff's detriment. Defendant's threat of restraint of plaintiff's trade overcame plaintiff's will and liberty of discretion to such an extent as to influence plaintiff to act in a way that plaintiff's judgement and discretion would condemn and prompt him not to do, if free

from such influence.

Defendant's exploitation of unfair advantage in exempting itself from much of the consequences of its own negligence and illegal acts amounts to unfair protection of the interests of defendant in so large a manner as to interfere with the public interest. If plaintiff had been afforded the option to choose protection under the law or arbitration then the arbitration provision would be enforceable. But compelling a consumer to renounce his protection under the law upon pain of denial of services is contrary to public policy. If the desired services could be obtained from another brokerage house the defendant might argue that plaintiff did not have to trade with it and therefore the duress was not so extreme as to force compliance. But brokerage house services currently are, and at the time of contract were, unavailable to any consumer unless that consumer signs a virtually identical compulsory arbitration provision.

There is a conspiracy of brokerage houses to deprive buyers and sellers of securities of rights to due process and protection of law in securities transactions by restraint of trade and commerce in purchase and sale of securities. Every major brokerage house has conformed to a uniform pattern of conduct in compelling the execution of a contract containing a compulsory arbitration provision. Plaintiff was unable to find any brokerage house large or small that does not impose upon its customers a contract stipulating compulsory arbitration as a precondition to business. When asked to name any which do not require compulsory arbitration prior to opening a margin account defendant could not name even a single example of a securities brokerage company which did not. Therefore choice even at another brokerage house was impossible.

Agreement, combination or conspiracy may be demonstrated in part from course of dealings warranting conclusion that conspirators had common design, meeting of minds or acted in concert and uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is restraint of interstate commerce is indicative of unlawful conspiracy under the Sherman Act.

The United States brought suit in the District court of the United States for the Southern District of New York, attacking an adhesion arbitration clause on the ground that it was in violation of the Sherman Anti-Trust Act. In an able opinion, Judge Thacher of that court held the arbitration clause of the contract to be unlawful as being in violation of the Sherman Anti-Trust Act, United States v. Paramount Famous Lasky Corporation, 34 F.(2d) 984, and entered a decree enjoining the Paramount Famous Lasky Corporation, from

acting under the arbitration clause in the contract. T he opinion and decree of the District Court was affirmed by the Supreme Court of the United States (Paramount Famous Lasky Corporation v. U.S., 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed.

District Judge Thacher adjudged that: "Trade or commercial groups or traders generally may voluntarily impose on themselves standard forms of agreement which do not unduly restrict competition and thus restrain trade, and may agree that all controversies should be settled by arbitration so long as such agreements are not sought to be imposed on others, regardless of their wishes, by coercive combinations having power to enforce their will.

The conspiracy charged in this case is predicated upon acts of the defendants in adopting and agreeing to use, and in using exclusively, certain uniform contracts for the lease of motion picture films to

theater owners throughout the United States, containing provisions for the determination by arbitration of all claims and controversies arising under said contracts.

...It had been the consistent policy of the distributors to refuse to deal with exhibitors who failed to arbitrate.... The coercive effect of this situation has undoubtedly been that, unless exhibitors submitted to arbitration...they have been unable to enter into new contracts.

...One can hardly imagine a more direct restraint upon trade than an agreement between competitors in an open market not to trade except upon terms which they have fixed in advance.

...In judging the inherent character of the restraint one must look not only to the restraint voluntarily imposed upon the competitive activities of those who are in the combination, but also to the involuntary restraint imposed upon the freedom of outsiders to engage in trade

under natural and normal conditions. It is therefore not enough to say that competition between distributors is keen and active, or even that it has been promoted and enhanced by what has been done, if, in fact, it can be seen that the freedom of others to engage in trade, to enter into normal commercial agreements, and to have recourse to the courts for their rights has been unduly restrained by the coercive and collective action of the defendants. That competition between the distributors has been promoted by the adoption of the standard exhibition contract, and that in many ways general trade conditions have been vastly improved, I have no doubt and so find. But the record is equally clear that all this good has been accomplished through the exercise of irresistible economic force consolidated by combination in the hands of the distributors, who collectively control the available supply of films and by virtue of

this control have imposed their will upon the industry. By agreement of these distributors exhibitors who were not represented in the adoption of the uniform contracts have been constrained to accept their terms regardless of their wishes, and by the compulsory system of arbitration, sanctioned and enforced by the collective action of the distributors, have been constrained to perform the contractual obligations thus assumed. In fairness it cannot be said that the restraint imposed upon these exhibitors is voluntary because they accept and agree to be bound by the contracts. They can have none other, because the defendants have agreed that they shall not; and, unless something more than the mere acceptance of all they can get is shown, they must be said to have acted under an involuntary restraint, imposed and continued by the defendants to the end that the contracts shall be signed and their terms obeyed. That such coercive restraint upon the commercial freedom of an

exhibitor, who was neither represented nor consulted with reference to the agreement to adopt the standard form of contract, is undue and unreasonable, both at common law and under the Sherman Act, I cannot doubt. Gains resulting from such restraints to the industry as a whole do not in the eyes of the statue justify the vicarious sacrifice of the individual, even for the sake of bigger and better business. A state Legislature could not lawfully impose compulsory arbitration upon the motion picture industry. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 ALR 1280. Much less should it be within the power of a combination of practically all the distributors to do so by coercion exercised through control of the available supply of films .

...The restraint, if not shown to have been voluntary on both sides, is oppressive, and therefore undue and

unreasonable.

...Nothing that has been said should be taken in derogation of the right of trade or commercial groups, or of traders generally, to voluntarily impose upon themselves standard forms of agreement which do not unduly restrict competition and thus restrain trade, or to agree that all controversies arising between them shall be settled by arbitration. Such agreements dealing only with the rights of those who execute and intend to be bound by them are normal and usual, and are proper instruments in the lawful conduct of trade. It is only when such agreements are sought to be imposed upon others, regardless of their wishes by coercive combinations having the power to say "Take what is offered or get nothing," that they become illegal." The instant case is indistinguishable from the Paramount Case in all essential elements concerning the arbitration clause.

Defendant's alleged right to force arbitration on all its customers whether they like it or not is in conflict with the Fourteenth Amendment to the United States Constitution, and deprives plaintiff of his property and liberty of contract without due process of law.

Duress in inducement of arbitration agreement is proper ground for revocation under 9 USCS Sec. 2. See Hellenic Lines LP v. Louis Dreyfus Corp. (1967, CA 2 NY 372 F2d 753).

The coercion and duress in the instant case consisted of illegal restraint of trade in violation of the Sherman Act. A Sherman Act violation in the signing of the arbitration agreement voids that agreement. It is fact that the defendant participates in a coercive combination with its brokerage industry competitors in obvious violation of Federal Anti-Trust Law.

By design no consumer shall anywhere trade securities unless he first renounce protection of law and accept arbitration.

The consumer is by duress deprived of the right of voluntary contract making the compulsory arbitration provision no contract at all. It is more simply a unilateral declaration by the brokerage houses in concert; not a mutually agreed contract and as such it is null and void and has no force of law. Defendant's allegation of Federal Law violation is directed to the arbitration clause itself - not the contract generally. Please see: Prima Paint Corp. v. Flood and Conklin Mfg. Co. 388 U.S. 395, 406 (1967): "Accordingly, if the claim is an illegal act in the inducement of the arbitration clause itself -- an issue which goes to the 'making' of the agreement to arbitrate -- the Federal Court may proceed to adjudicate. This position is consistent both with the decision in Moseley v. Electronic Facilities, 374 U.S. 167, 171, 172 (1963) and with the statutory scheme. As the 'saving clause' in Sec. 2 indicates, the

purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge ... would be to elevate it over other forms of contract -- a situation inconsistent with the 'saving clause'") see 388 U.S. 403-404).

Federal policy suggesting that arbitration be encouraged did not give license for coercive combinations which operate in restraint of trade; nor does such a policy allow violation of Federal Anti-Trust Law in order to promote arbitration. Nor does it allow duress to be used in the making of an arbitration contract.

It has been established that claims under the Sherman Anti-Trust Act are inappropriate for arbitration. Please see American Safety Equipment Corp. v. J. P. Maguire & Co. (1968, CA2 NY) 391 F2d 821, 3 ALR FED 901.

In Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985), The Supreme Court pointed out by way of footnote that the decision expressed no view on the validity of arbitration provisions contained in adhesion contracts and that the issue was not addressed because it was not first raised in the lower courts and they thought it improper to address it in the first instance. However, the Supreme Court has previously ruled that an arbitration provision contained in a contract of adhesion is null and void if it is imposed by a participant in powerful coercive combination which acts to restrain trade of those who fail to agree to arbitrate. Until and unless The Supreme Court reverses itself on that decision it is the law. This case is in every particular exactly the same as the Paramount case (34 F2d 984 and 282 U.S. 30) as regards the agreement to arbitrate and therefore it must be treated under the law in the same manner. In order to validate its adhesion arbitration

clause, defendant must show that this case and the Paramount case are different. But it can not, for they are the same as regards the adhesion arbitration clause.

Today a film exhibitor can contract for film rental without executing an arbitration agreement. An investor should also be able to deal with a brokerage house under the protection of law. The standard that this Court should impose is that arbitration provisions of brokerage contracts may not be enforced against the party which had no choice because of restraint of trade. Rejection or acceptance of compulsory arbitration by free choice could be shown upon the contract by the initialing of appropriate box. Similarly, contracts for loans often used to include adhesion provision that insurance, often at high cost, be purchased by the borrower. Lending institutions must now allow the consumer to accept or reject this coverage, which is accomplished by the consumer

initialing his choice in an appropriate box upon the contract. The court should require that if defendant wants mandatory arbitration it must draft its contracts in such a way that the arbitration provision is not adhesion but rather is shown to be the free choice of the consumer. Once agreement to arbitrate is made, without duress, then and only then is the contract binding with the force of law and the Courts to compel arbitration as per the Byrd decision.

The Supreme Court had to assume that no duress or compulsion by monopoly was involved in the making of the agreement to arbitrate in the Byrd case because that is the way the case came to them. However, unlike the Byrd case, in this case there is allegation that the agreements to arbitrate are not valid or enforceable because of violations of Law in the making of the agreement to arbitrate.

If the securities brokerage industry is allowed to place itself above the law by

legislating by contract could not then any monopoly exempt itself from the rule of law by embracing an arbitration panel? Such a policy would be against the public interest. And therefore the arbitration contract in question in this case is void because it is against strong protective public policy concerns.

There being no private consent to support a contract of adhesion, its legitimacy rests entirely on its compliance with standards in the public interest. Defendant's adhesion arbitration clause must be declared void as a result of its imposition by monopoly in violation of Federal law as per the Supreme Court's Paramount decision. Defendant should send a contract addenda to its current customers allowing them to choose either arbitration or the law in the event of future controversy. Legally, the customer must be able to choose either, at the customer's sole option, because the voiding of the

contract provision for compulsory arbitration due to compulsion by monopoly is not available to defendant, although by the law of the Paramount case it currently is to defendant's customers which includes plaintiff in this case.

The Commodity Futures Trading Commission in 17 C.F.R. Section 180.3 voided arbitration agreements which, inter alia, are not voluntary. The record of Ames v. Merrill Lynch Pierce, Fenner & Smith Inc. 567 F2d 1174 (1977) shows why: Because the brokerage houses admitted that if a trader did not sign a compulsory arbitration agreement he was not able to trade effectively and was thus squeezed out of the commodities market. Today we have the exact same situation regarding trading securities in margin accounts: It is impossible to trade effectively in securities without a margin account and an investor can not get one anywhere unless he signs a compulsory arbitration agreement. The Court should recognize the gross

violation of law exhibited by the securities industry when they legislate by adhesion contract and the Court should prohibit enforcement of compulsory arbitration by adhesion contract.

Things will become fair and equitable in securities trading only if a man chooses to arbitrate and signs a contract to that effect because he perceives it to be to his own advantage, which free choice and perceived advantage are the essence of a contract and an unfair adhesion demand upon pain of loss of necessary services is no contract and is contrary to the principles upon which this great nation was founded. And should the Court allow it in this instance what then prevents other coercive combinations from setting up their own arbitration panels and by irresistible economic force and adhesion contract then exempting themselves from the rule of law?

Plaintiff conferred by telephone with counsel for defendant on April 10, 1987 and

we were unable to reach an agreement upon the disposition of the matters raised by this motion.

The submission date of this motion is Monday April 20, 1987.

WHEREFORE, plaintiff C. G. Dillard does respectfully submit to the Court that it should order that jury trial be had in order to settle the issues raised concerning the validity and enforceability of the alleged agreement to arbitrate between plaintiff and defendant. Specific findings of the jury should be such that they will conclusively determine if there is such an agreement or if the alleged agreement is rendered null and void because of findings of fact which show:

Common Law violations

State Law violations

Federal Law violations

U.S. Constitutional Law violations

Date of Entry: April 20, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD,	$	
Plaintiff,	$	
	$	
v.	$	No. H-85-4135
	$	
MERRILL LYNCH, PIERCE,	$	
FENNER, SMITH, INC.,	$	
	$	
Defendant.	$	

ADDENDUM TO PLAINTIFF'S MOTION FOR TRIAL BY JURY RESTRICTED TO SPECIFIC ISSUE OF THE ARBITRATION AGREEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW C. G. Dillard, plaintiff in the above referenced action and files this addendum to Plaintiff's Motion For Trial By Jury Restricted To Specific Issue Of The Arbitration Agreement, and would show the court the following:

Plaintiff does hereby name as co-conspirators with defendant in unreasonable restraint of trade, as more fully set forth in Plaintiff's Motion For Trial By Jury Restricted To Specific Issue Of The

Arbitration Agreement, Securities Industry Association, Inc.

Securities Industry Association, Inc., herein named co-conspirator and joint violator of substantive federal anti-trust law is the principal trade association of the securities industry. It has as members more than five hundred securities firms in the United States and Canada. Most of the Securities Industry Association, Inc.'s members, by mutual agreement and conscious design, use substantially identical adhesion contracts to force all margin account customers to arbitrate any controversies arising between them. Enclosed is Exhibit "A", the customer agreement form for Securities Industry Association, Inc. member, Drexel Burnham Lambert, please note section sixteen.

Plaintiff does name Securities Industry Association, Inc. as co-conspirator with defendant, Merrill Lynch, Pierce, Fenner and Smith, Inc. in violation of anti-trust laws under Sections One and

Two of the Sherman Act, Section 15 U.S.C.S.

Individual members of the Securities Industry Association, Inc., which have participated with defendant in unreasonable and illegal restraint of trade by adopting and agreeing to use and in using exclusively uniform margin account contracts for securities trading containing provisions for the determination by arbitration of all claims and controversies arising under said contracts, are charged as unnamed co-conspirators with defendant in it's Sherman Act violations and other federal law violations.

To the best of plaintiff's knowledge and belief, the number of Securities Industry Association, Inc. members who refuse to deal in order to force their margin customers into unjust arbitration agreement is 100%. This refusal to deal by all of the members who offer margin accounts of an organization that is representative of so many in the securities

industry that it's membership is in fact a securities industry monopoly constitutes an illegal group boycott and illegal group boycott by the members of the Securities Industry Association, Inc. is charged.

Plaintiff will at trial introduce evidence of the concerted illegal actions of Merrill Lynch, Pierce, Fenner and Smith, Inc., Securities Industry Association, Inc. and many of the individual members of the Securities Industry Association, Inc. as well; this pleading is meant to give notice under Rule 8 of the Federal Rules.

Defendant has ignored Plaintiff's anti-trust charges and has attempted to use unexplained, alleged, secret, defects in plaintiff's pro se pleading to provide excuse for the judge of this court to dismiss. The pleadings of plaintiff are adequate under the law for plaintiff to demand trial by jury on the arbitration issue.

WHEREFORE, PREMISES CONSIDERED, plaintiff C. G. Dillard respectfully prays that the court grant his Plaintiff's Motion For Trial By Jury Restricted To Specific Issue Of The Arbitration Agreement.

Respectfully submitted,

C. G. Dillard
118 Hoffman Way
Grants Pass, Oregon 97526
1-503-474-1565

PLAINTIFF

Date of Entry: February 11, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. G. DILLARD	$	
	$	
Plaintiff	$	
v.	$	NO. H-85-4135
	$	
MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC.	$	
	$	
Defendant	$	

MOTION FOR FINDINGS OF FACT
AND CONCLUSIONS OF LAW
CONCERNING INJUNCTIVE RELIEF
AND OTHER PREVIOUSLY FILED MOTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, C. G. Dillard, Plaintiff in the above referenced action, and files this Motion for Findings of Fact and Conclusions of Law Concerning Injunctive Relief and Other Previously Filed Motions, and would show the Court the following:

Mr. Dillard talked with Karl Stern, Counsel for Defendant, on February 10, 1988 about the issues herein but was unable to reach agreement.

Judge Sterling indicated that his initial impression was to sign orders compelling arbitration and disposing of other motions and he did instruct Karl Stern, Counsel for Defendant, to draft such order and Mr. Stern did so. Mr. Dillard objected to the form of the order in that it neglected to specify findings of fact which supported the conclusions of law. Judge Sterling signed no order and no order was entered.

Mr. Dillard suggests to the Court that no order was signed because, upon reflection and review, it was evident that compulsory arbitration compelled by monopoly was unsupportable in fact and in law. Mr. Dillard prays that this Honorable Court should now enjoin enforcement of compulsory arbitration provisions of Defendant's adhesion contracts or in the alternative, this Court should order trial by jury restricted to specific issue of the arbitration agreement or in the alternative, this Court should determine

without jury that compulsory arbitration is invalid and unenforceable due to violation of the Sherman Act in the making of the agreement to arbitrate.

The death of Judge Sterling leaves all motions unresolved since no order has been entered. Mr. Dillard respectfully requests the Honorable Judge of this Court to carefully review the record and promptly issue written order granting or denying each motion by statement of conclusion of law, and Mr. Dillard requests explanation of each conclusion of law with a supporting finding of fact.

Mr. Dillard planned en banc appeal to the 5th Circuit should order be issued compelling arbitration, but appeal is improper since jurisdiction remains with the District Court in the absence of the entry of any order. The arbitration issue is of great national importance. The U. S. Supreme Court has addressed the issue of compulsion by monopoly in the making of

agreement to arbitrate in like contract in Paramount v. U. S. 282 U. S. 30 and U. S. v. Paramount 34 F 2nd 984. The Supreme Court supports Mr. Dillard's position; all rulings which support or expand the scope of compulsory arbitration under brokerage contracts have assumed that the contract was legally made because that was the way the case came to the High Court. Because the issue of illegal contract was not first raised in the Lower Courts, the High Court did not address this issue. Mr. Dillard is asking the Honorable Court to address this issue now and to issue order enjoining Defendant from continuing its illegal conduct.

Today, current news magazines lament the plight of investors who are cheated out of fair hearing by compulsion to settle disputes in an unfair forum set up by the brokerage industry. Today the Halls of Congress ring with denunciations of the abuse of the individual investor and call for more regulation of the brokerage

industry. Each passing day that the brokerage industry, acting illegally with its competitors in concert, is allowed to use arbitration, compelled by monopoly, in a forum set up by that same monopoly as a license to steal lines the brokerage houses' pockets with millions of dollars which under the law should and would be ordered returned to cheated investors. Mr. Dillard urges the Court to carefully-review the record of this case and to promptly issue order enjoining continued violation of the Sherman Act, 15 U.S.C.S. Sec. 1 et. seq.

Plaintiff respectfully prays that the Court will rule upon each and every motion in this case by written order and that hearing will be scheduled at the Court's earliest convenience, but only if the Court has any questions, and most importantly, Mr. Dillard urges that this Court should immediately issue order to enjoin enforcement of compulsory arbitration

provisions of Defendant's adhesion contracts due to clear violation of the Sherman Anti-Trust Act and other substantive Federal Law in the making of the agreement to arbitrate. Defendant has ignored Plaintiff's anti-trust charges because it cannot defend against them for they are true and correct in every respect. There is in the pleadings overwhelming weight of evidence of Federal anti-trust law violations by Defendant, and a total absence of any denial by Defendant of the facts presented by Plaintiff. The facts clearly indicate unreasonable and illegal restraint of trade by Defendant and its brokerage industry competitors acting in concert to illegally group boycott by concerted refusal to deal with Plaintiff and other consumers of services with deliberate intent that brokerage services be unavailable except under terms of similar unfair adhesion demand; that the Law and the Courts be subservient to arbitration panels organized by the

securities brokerage industry for the benefit of the securities brokerage industry. This Court should, by written order, declare the arbitration clause of the contract in question with Plaintiff to be null and void and order should be issued enjoining Defendant from attempting to enforce the adhesion arbitration clause against any and all of its other customers since it is apparent that like Federal anti-trust law violations occurred in the making of all Defendant's customer contracts.

WHEREFORE, PREMISES CONSIDERED, Plaintiff C. G. Dillard respectfully prays for immediate injunctive relief and for findings of fact and conclusions of law on the motions by written order of this Honorable Court, without hearing, unless hearing be requested by Defendant or hearing be in the opinion of the Court desirable.

Respectfully submitted,

C. G. Dillard, Plaintiff
118 Hoffman Way
Grants Pass, Oregon 97526
1-503-4741565

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Findings of Fact and Conclusions of Law Concerning Injunctive Relief and Other Previously Filed Motions has been delivered to:

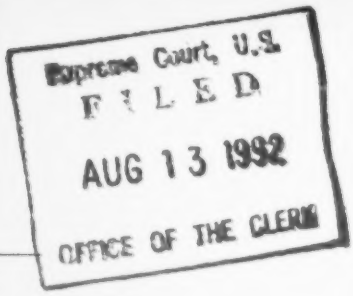
Vinson & Elkins
Mr. Karl Stern
First City Tower
1001 Fannin
Houston, Texas 77002-6760

by hand delivery on this 11th day of February, 1983

BEST AVAILABLE COPY

92-857

No.



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CARVEL GORDON DILLARD,
Petitioner

versus

SECURITY PACIFIC CORP.;
MERRILL LYNCH, PIERCE FENNER & SMITH, INC.;
SECURITIES INDUSTRY ASSOCIATION, INC.;
SECURITY PACIFIC BROKERS, INC.;
FINANCIAL CLEARING & SERVICES CORPORATION;
JENKINS & GILCHRIST (A PARTNERSHIP); and
JENKINS & GILCHRIST (A-PROFESSIONAL CORP.)
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VOLUME 2 of 2 VOLUME APPENDIX

Carvel Gordon Dillard, pro se
903 SW Central
Grants Pass, OR 97526
(503) 479-0098

CIVIL DOCKET SHEET
H-86-3251

PLAINTIFF	DEFENDANT
CARVEL DILLARD	SECURITY PACIFIC BROKERS, INC. & FINANCIAL CLEARING & SERVICES CORP.

DATE	NR.	PROCEEDINGS
8-20-86	1	ORIGINAL COMPLAINT, with JURY DEMAND, FILED.
8-20-86	2	(RNS) ORDER, filed. Pltf to serve this order and attachment on defts. Parties may submit revised DCO within 90 days.
8-20-86	3	(RNS) DOCKET CONTROL ORDER, filed. Amendments & New Parties July 24, 1987 Motions July 24, 1987 Joint PTO Sept 1, 1987 Docket Call Sept 8, 1987, 11:00 am
8-20-86		SUMMONS (2) issued w/cc of service order and DCO.
9-18-86	4	Defts' ORIGINAL ANSWER. filed. fs dkt'd 9-24-86
12-3-86	5	Pltf's NOTICE OF ORAL DEPOSITION of Jeff D. Albaugh on Dec 11, 1986 at 9:30 a.m., filed. blh Dkt'd 12-3-86
12-10-86		Rec'd William M. Parrish (Defts' attorney) address correction. blh
12-10-86	6	Defts' MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT THEREOF, filed. blh (Opposed) M/D Jan 5, 1987 by Clerk Dkt'd 12-17-86

12-10-86	7	Copy of AGREED MOTION TO CONSOLIDATE (C.A. H-84-1079), filed. blh Dkt'd 12-17-86
12-18-86	8	(COB) ORDER, filed. Parties ntfd. blh 1. Motion to Consolidate with C.A. H-84-1079 DENIED. Dkt'd 12-23-86
12-22-86	9	Pltf's MOTION FOR PRODUCTION OF NAMES OF PERSONS WITH RELEVANT KNOWLEDGE, filed. blh M/D Dec 29, 1986 by Counsel M/D Jan 12, 1987 by Clerk Dkt'd 12-23-86
12-29-86	10	Pltf DILLARD'S MEMORANDUM IN OPPOSITION TO DEFTS' MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT THEREOF, filed with attachments. blh Dkt'd 1-7-87
1-6-87	11	Defts SECURITY PACIFIC and FINANCIAL'S MOTION FOR SUMMARY JUDGMENT, filed with Exhibits. blh M/D Jan 26, 1987 by Clerk Dkt'd 1-7-87
1-6-87	12	Defts SECURITY PACIFIC and FINANCIAL'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, filed. blh Dkt'd 1-7-87
1-6-87	13	Defts SECURITY PACIFIC and FINANCIAL'S MOTION FOR PROTECTIVE ORDER, filed with Exhibits. blh (Opposed) M/D Jan 26, 1987 by Clerk Dkt'd 1-7-87

1-6-87	14	Defts SECURITY PACIFIC and FINANCIAL'S BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER, filed. blh Dkt'd 1-7-87
1-7-87	15	Defts SECURITY PACIFIC and FINANCIAL'S EX PARTE APPLICATION FOR ORDER SHORTENING TIME TO CONSIDER MOTION FOR PROTECTIVE ORDER, filed. blh (Opposed) M/D Feb 2, 1987 by Clerk Dkt'd 1-7-87
1-8-87	16	(RNS) ORDER, filed- Parties ntfd. blh 1. Defts Security Pacific and Financial Clearing's Motion for Protective Order GRANTED. 2. All discovery pertaining to present dispute STAYED until Pltf has responded to and Court ruled upon Defts' claims of res judicata and collateral estoppel. Dkt'd 1-8-87
1-29-87	17	Pltf's BRIEF IN OPPOSITION to Motion for Summary Judgment. filed. fs dkt'd 2-10-87
4-14-87	18	Defts' REPLY TO PLTF'S BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, filed with Exhibits. blh Dkt'd 5-6-87

4-16-87	19	(RNS) MOTION CONFERENCE MINUTES, filed. blh Appearances: Dillard, pro se; Parrish for Defts; Rptr: Fred Warner 1. Deft motion for summary judgment GRANTED - on grounds that the current claims could have and should have been brought in prior action in Judge Bue's Court. 2. Pltf has agreed that the Court claims are absolutely barred by limitations ($12(1) and $12(2) claims). Dkt'd 5-6-87
5-7-87	20	Pltf's MOTION FOR LEAVE OF THE COURT TO SERVE THIS SUPPLEMENTAL PLEADING, filed. blh (Opposed) M/D May 18, 1987 by Pltf pro se Dkt'd 5-12-87
5-7-87	21	Pltf's MOTION TO STRIKE FROM THE RECORD OF THE INSTANT CAUSE ALL QUOTATIONS FROM AND EXAMPLES OR EXHIBITS OF CARVEL DILLARD'S PLEADINGS IN THE CAUSE NUMBER H-84-1079, filed with attachment. blh (Opposed) M/D May 18, 1987 by Pltf pro se Dkt'd 5-12-87
5-18-87	22	Defts' RESPONSE TO PLTF'S MOTION TO STRIKE QUOTATIONS, EXAMPLES AND EXHIBITS, filed. blh Dkt'd 5-21-87
5-20-87	23	(RNS) ORDER, filed. Parties ntfd. blh 1. Defts' Motion to Dismiss GRANTED. Dkt'd 5-21-87

5-20-87	24	(RNS) FINAL JUDGMENT, filed. Parties ntfd. blh 1. Case DISMISSED. 2. This is a FINAL JUDGMENT. Dkt'd 5-21-87
6-18-87	25	Pltf. NOTICE OF APPEAL to Final Judgment entered May 20, 1987, filed. mac
6-18-87		Filing & Docketing Fees both paid. (Rcpt.#3144389 $105.00) mac
6-18-87	26	Court Reporter's TRANSCRIPT OF HEARING on Apr 16, 1987, filed. Rec. and Dkt'd 6-19-87 mac
6-19-87	27	Pltf. TRANSCRIPT ORDER FORM advising that the transcript was complete on Jun 19, 1987, filed. mac
6-22-87		RECORD ON APPEAL consisting of All Original Papers (1 Vol) and Transcript (1 Vol.) forward to Court of Appeals. mac
4-13-88	28	Certified Copy of JUDGEMENT by court of Appeals on Jan 15, 1988 issued, as MANDATE on Apr 11, 1988, VACATING & REMANDING to District Court for further proceedings, IT IS FURTHER ORDERED that each party bears its own costs on appeal, filed. bw dkt'd 4-26-88
4-13-88	29	Certified Copy of OPINION by Court of Appeals, filed. bw dkt'd 4-26-88

4-13-88		Record on Appeal RETURNED by Court of Appeals, reassembled and given to June C. bw
4-13-88		CASE REOPENED to Judge DeAnda by random draw, per JEC memo of 4/26/88. bw
1-6-88	30	Deft's NOTICE OF Incorporation and Change of name, filed. db (Jenkins & Gilchrist) Dkt'd 4-27-88
6-21-88	31	(JDA) ORDER setting conference on all pending matters, filed. Parties ntfd. pg Dkt'd 6-23-88 Motions 7-18-88 Responses 8-15-88 Conference set 8-31-88 at 4:00 p.m.
8-4-88	33	(JDA) ORDER, filed. Parties ntfd. db Conference for setting on Aug 31, 1988 is vacated. Dkt'd 8-5-88
8-2-88	34	(JDA) ORDER, filed. Parties ntfd. db Supplemental complaint is stricken from record because Pltf failed to request leave of court to file it.
8-2-88	35	(JDA) ORDER, filed. Parties ntfd. db Case is transferred back to docket of Sterling.
9-1-88		Case Transferred to Docket of Judge Sim Lake. Dkt'd 8-8-88
8-22-88		Recd copy of Petition to the Chief Judge, fwd to crd. fs 8-29-88

5-30-89	36	Pltf's NOTICE OF CONSOLIDATED APPEAL, filed. bw dkt'd 6-2-89
5-30-89		Filing & Docketing Fees BOTH Paid. (Rec't #327485) bw
6-15-89	37	Pltf's DESIGNATION OF RECORD OF CONSOLIDATED APPEAL, filed. bw (Entire File)
7-14-89	38	Pltfs TRANSCRIPT ORDER FORM advising that the transcript is already on file in the Clerk's Office, filed. bw dkt'd 7-14-89
7/28/89	39	(SL) ORDER entered, parties notfd. jd Court will conduct a telephone conference call on Sept. 15, 1989 at 2:00 p.m. to determine status of this case. Court's Secretary will call Pltf. and Wm. Parrish, counsel for Deft. at scheduled time. By Sept. 8, 1989 each party is to submit a memorandum setting out the causes of action and defenses remaining for trial, any additional discovery that is necessary and the date by which a joint pretrial order can be filed. eod 7/28/89 jd
9-8-89	40	Defts' MEMORANDUM IN RESPONSE TO ORDER of 7-27-89, filed. dj eod 9-13-89

BEST AVAILAB

9-11-89	41	Pltf's MOTION TO ADD CLAIMS TO COMPLAINT; MOTION TO RESERVE THE PLEADING OF INCREASED DAMAGES UNTIL TRIAL; MOTION TO ADD JENKINS & GILCHRIST & SECURITY PACIFIC CORP. AS DEFTS; MEMORANDUM OF CAUSES OF ACTION REMAINING FOR TRIAL; and AFFIDAVIT IN SUPPORT of the Motions, filed. dj eod 9-13-89
9-15-89	42	Pltf's MOTION FOR SUMMARY JUDGMENT AND PROPOSED ORDER THEREOF, filed. M/D 10-05-89 by clerk. eod 9-19-89
9-19-89	43	(SL) HEARING MINUTES AND ORDER, entered. Parties notified. Hearing held 9-15-89. Reporter: Shaeffer. Appr: Carvel Dillard for Pltf. W. Parrish for Deft. Pltf has 30 days to file amended complaint. No depo's can be taken w/o 10 days notice. Pltf's mtn for summary judgment is DENIED as frivolous. (Summary judgment received in Chambers on 9-15-89)
9-19-89	44	(SL) DOCKET CONTROL ORDER, entered. Parties notified. New parties — Jan 01. 1990 Discovery — Sep 30, 1990 Motions — Oct 07, 1990 Joint PTO — Jan 04, 1991 Docket Call — Jan 11, 1991 @ 4:00 PM cj
10-25-89	45	Pltf's MOTION for Stay Until there is a Decision of the Appeals Court in a Related Action, filed. bj eod 10-25-89 M/D 11-14-89 by clerk

LE COPY

10/27/89	46	(SL) ORDER entered, parties notfd. A new scheduling order showing time for filing amended Complaint, will be issued subsequent to the issuance of the appeals court's ruling. The present docket control order will continue to apply to the present parties. eod 10/27/89 jd
3/12/90		Notice of change of address for Deft. atty. eod 3/21/90 jd
7/20/90	47	Defts' RULE 41(b) MOTION to dismiss, filed. ymm M/D 8/9/90 eod 7/31/90
8-13-90	48	Pltfs' MOTION to Extend Time for Filing Opposition to Motion to Dismiss MOTION to Consolidate H-88-2848 and H-86-3251 MOTION for Stay, filed. bj M/D 9-4-90 by clerk eod 8-16-90
8/13/90		Dillard's LETTER in re: change of address. rec'd. ymm
8/30/90	49	Defts' RESPONSE to Pltfs Motion to Consolidate, filed. eod 9/6/90 pv
8/30/90	50	Defts' RESPONSE to Pltfs Motion to Stay, filed. eod 9/6/90 pv
8/30/90	51	Defts' RESPONSE to Pltfs Motion to Extend Time for Filing and Reply to Pltfs Opposition to Motion to Dismiss, filed. eod 9/6/90 pv

9/10/90	52	(SL) ORDER, entered, Parties ntfd. br Pltf. shall file an amended compl by Oct. 5, 1990 or this action will be dismissed. Pltf's Mtns f/stay & to consolidate this action w/H-86-3251 are DENIED. EOD 9/13/90 br
10/5/90	53	Pltf's MTN FOR LEAVE TO AMEND COMPLAINT, filed. M/D 10/25/90 by clerk. (Orig. to Amended Complaint to CRD) eod 10/9/90 kds
10-5-90	54	Pltf's First Amended Complaint, filed. bj eod 10-18-90
10/29/90	55	Defts' RULE 12 MOTION REGARDING PLTFS FIRST AMENDED COMPLAINT, filed. M/D 11/18/90 eod 11/15/90 pv
11/19/90	56	Pltf's OPPOSITION to Defts rule 12 Motions Regarding Pltfs First Amended Complaint and Pltfs Second Motion for Stay and Consolidation, filed. eod 11/28/90 pv
11-28-90	57	Defts' RESPONSE to Pltf's Second Motion for Stay and Consolidation, filed. eod 12-11-90
11-28-90	58	Defts' REPLY to Dillard's Response to Rule 12 Motions, filed. eod 12-11-90
12/21/90	59	DILLARD'S REPLY TO DEFT'S REPLY TO DILLARD'S RESPONSE TO RULE 12 MOTIONS, filed. fas eod 12/31/90

12/26/90 60 MEMORANDA CONCERNING ERROR IN EXHIBIT TO DILLARD'S REPLY TO DEFT'S REPLY TO DILLARD'S RESPONSE TO RULE 12 MOTIONS, filed.
eod 12/31/90

12/31/90 61 (SL) MEMORANDUM AND ORDER, entered. Parties ntfd. fas
1. Defts' Motion to Dismiss Dillard's claim asserting a cause of action under 18 U.S.C. 1951 is GRANTED, and this claim is DISMISSED.
2. Defts' Motion to Dismiss Dillard's RICO claim is GRANTED, and this claim is DISMISSED without prejudice.
3. Defts' Motion to Dismiss Dillard's claims against defts' "for damages to pltf due to... Title 42 violation of civil rights" is GRANTED, and these claims are DISMISSED without prejudice.
4. Defts' Motion to Strike is GRANTED as to paragraph 8-18, 21-23, 29, 40-45, 88-90, 94-108, 111, and 114-125 of Dillard's First Amended Complaint, and DENIED as to paragraphs 1, 2-5, 49-68, and 91-93.
5. Defts' Motion for a More Definite Statement is DENIED.
6. Pltf's Second Motion for Stay and Consolidation (#56) is DENIED.

eod 12/31/90

12/31/90	62	(SL) FINAL JUDGMENT, entered. Parties ntfd. fas This action is DISMISSED. This is a FINAL JUDGMENT. eod 12/31/90
1-30-91	63	Pltf's NOTICE OF APPEAL from the Final Judgment entered on 12-31-90, filed. (no fees accepted) eod 2-11-91 km
2-11-91		Mailed notice of filing appeal to all parties and CCA. km
2-28-91	64	Pltf's TRANSCRIPT ORDER FORM requesting transcription of proceedings held 9-15-89 (telephone conference) (Crtrptr J. Schaefer) filed. km
3-1-91	65	Crtrptr J. Schaefer TRANSCRIPT of proceedings held 9-15-89, filed. km (1 volume)
3-6-91	66	Copy of letter from CCA to Mr. Dillard-appellant requesting payment of fees for appeal 91-2135, filed. eod 3-11-91 km
3-11-91		Filing and docketing fees both paid. (Rcpt 400081) km

Date of Entry: October 5, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL DILLARD Plaintiff	
	No. H-86-3251
v.	
SECURITY PACIFIC BROKERS, INC. AND FINANCIAL CLEARING & SERVICES CORPORATION Defendants	

FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff, CARVEL G. DILLARD files this his first amended complaint against: SECURITY PACIFIC BROKERS, INC. AND FINANCIAL CLEARING AND SERVICES CORPORATION defendants herein and asks for trial by jury. The defendants have been served by U.S. Certified Mail, Return Receipt Requested, to their attorney each with copy of this Complaint.

JURISDICTION AND VENUE

This court has federal question jurisdiction under the provisions of 28

U.S.C. 1331 because of the allegations of violations of Federal Law. Additionally, this court has subject matter jurisdiction pursuant to 28 U.S.C. #1332(A)(1) because it is a civil action between citizens of different states where the amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

Venue is proper in this district pursuant to 28 U.S.C. #1391(A) because the claim arose here.

DESCRIPTION OF THE PARTIES

1. "My name is Carvel Gordon Dillard. I am the plaintiff herein. I am 44 years old and have never been convicted of a felony.

2. I have never been convicted of any law violation other than minor traffic violation.

3. I have never had a judgement taken against me in any court of law except one default judgement in H-84-1079.

4. That action is the only time I have ever been sued.

5. There is no pending civil suit against me nor any pending charge that I have violated the law.

6. I was an investor and arbitrager and in that capacity had securities brokerage dealings with Security Pacific Corp., through its subsidiaries Security Pacific Brokers, Inc. and Financial Clearing and Services Corporation.

7. The subsidiaries are defendants herein and the parent corporation should be defendant.

8. Security Pacific Corp. is a corporation organized under the laws of a state other than Texas which does business in Houston, Harris County, Texas, as well as other locations through its subsidiaries.

9. Security Pacific Corp.'s principal place of business is California.

10. Security Pacific Corp. is California's second largest bank holding

company and it is engaged in the business of providing, among other things, banking, brokerage and financial services.

11. Security Pacific Corp., Security Pacific Brokers, Inc., and Financial Clearing and Services Corporation are herein referred to as "S. Pacific".

12. Jenkens & Gilchrist is a Texas corporation and it should be a defendant both as a partnership and as a professional corporation because it is culpable for damages done while a partnership and for subsequent damages after time of incorporation.

13. Jenkens & Gilchrist is a law firm and is herein complained of for knowingly participating in criminal conspiracy and knowing and deliberate commission of several felony crimes in conjunction with their representation of S. Pacific.

14. They are co-conspirators; S. Pacific, and Jenkens & Gilchrist are each guilty of the crimes of the other.

15. Merrill Lynch, Pierce, Fenner and Smith, Inc., herein "Merrill Lynch", is directly connected to the malicious prosecution in part through Jeff Roys, the employee of S. Pacific who deliberately made an untrue complaint, under Jenkens & Gilchrist supervision, to elicit criminal prosecution of Mr. Dillard, in reward for which Steven McAnally, employee of Merrill Lynch, who looted Mr. Dillard's account at Merrill Lynch awarded him a job at Merrill Lynch.

16. Merrill Lynch falsely told the District Attorney investigator that Mr. Dillard never had any money in his Merrill Lynch account.

17. They are co-conspirators and Merrill Lynch, S. Pacific, and Jenkens & Gilchrist are each guilty of the crimes of the other.

18. Various other persons, firms and corporations not yet made defendants herein have participated as co-conspirators with the defendants in some of the offenses

hereinafter charged and have performed acts and made statements in furtherance thereof. Said co-conspirators include, but are not limited to: Merrill Lynch, Pierce, Fenner and Smith Inc., Jenkens & Gilchrist (A Partnership), Jenkens & Gilchrist (A Professional Corporation), and Security Pacific Corp.

19. The illegal acts of the defendants were authorized, ordered, and accomplished by corporate officers, agents, employees or representatives while they were actively engaged in management, control, or direction of business activity.

20. Service of process in this litigation can be accomplished as follows:

CARVEL G. DILLARD, Plaintiff, Pro Se:

903 SW Central
Grants Pass, Oregon 97526
(503) 479-0098

SECURITY PACIFIC BROKERS and FINANCIAL CLEARING AND SERVICES CORPORATION, Defendants, through their attorney:

Steve Stewart
Jenkens & Gilchrist
1200 Citicorp Center
1200 Smith Street
Houston, Texas 77002

21. Attached as Exhibit "A" to affidavit of Carvel G. Dillard filed herein in September 1989 is notice of complaint from District Attorney demanding that $86,661.25 be paid to S. Pacific.

22. Attached to affidavit as Exhibit C was pages 1 through 6 of a statement of account for Account No. 48100090, which is my account at S. Pacific.

23. The statement of account shows that: there was no deposit prior to trading.

24. I was trading upon credit extended by S. Pacific. Payment for a subsequent loss was refused by me because it was not my loss.

25. The record of Account No. 48100090 shows trading occurring on February 17, 1984, and no deposit to account until February 21, 1984. Therefore, by S. Pacific's own record, the trading was for a

period of at least three days indisputably on credit.

27. Payables owed me by broker Merrill Lynch were deposited payable to me in my S. Pacific account while the trading continued on credit.

28. S. Pacific had no legal recourse against me for theft should as happened Merrill Lynch fail to pay as I ordered.

29. Merrill Lynch had just previously confirmed my excellent credit to S. Pacific Manager, Jeff Roys, by telephone prior to my opening account at S. Pacific.

30. S. Pacific improperly attempted to charge me with a trading loss caused by their own gross negligence.

31. I refused to pay it.

32. S. Pacific claimed $56,256.00.

33. This amount was subject of lawsuit H-84-1079, but no fact of that dispute has ever been adjudicated on merit since that litigation has been decided upon default and therefore there is no res judicata or

estopple effect from H-84-1079 whatsoever.

34. S. Pacific overreached by claiming theft of $86,661.25.

35. S. Pacific used the knowingly fraudulent allegation of theft of $86,661.25 to have the State of Texas harass and oppress me by threat of jail unless I pay S. Pacific all of $86,661.25.

36. Under color of official right S. Pacific pressed their unjust claim to $86,661.25 causing me grievous injury and defamation.

37. In violation of our contract, which specified that unpaid demands for payment from other of my debtors would be returned to me, S. Pacific retained the unpaid demands upon Merrill Lynch and falsely told the District Attorney that I had endorsed them payable to S. Pacific.

38. The District Attorney, in violation of the rule that demands examination of the draft itself to determine payee, took action against me on the bare allegation of S. Pacific manager,

Jeff Roys, as he was directed by William Parish of the law firm of Jenkens & Gilchrist.

39. That Jeff Roys made complaint for theft of $86,661.25 is in District Attorney's records that I examined; that William Parrish directed Jeff Roys in this extortion and arranged the threat of arrest I cannot doubt because in telephone conversation with Mr. Parrish he admitted those facts to me.

40. Far from admitting the error of this $86,661.25 claim, Mr. Parrish claimed in written pleadings to the 5th Circuit that this bogus claim had been adjudicated in S. Pacific's favor in H-84-1079.

41. I was unable to show the appeals court the statement of account of Account No. 48100090 because I did not have it.

42. You will note that the statement is addressed to #1C and #1C is not and never has been my address.

43. S. Pacific apparently sent the

copy to the wrong address.

44. I obtained copy of the statement for the first time in April 1989.

45. The default in H-84-1079 occurred because I did not receive my mail.

46. S. Pacific must perfect their claim to the $86,661.25 or be adjudged guilty of multiple crimes and incur civil liability for my injury as a result of their theft claim.

47. Neither the drafts nor the statement of account supports this outrageous $86,661.25 claim.

48. S. Pacific and Jenkens & Gilchrist did harass and oppress me under color of Texas state law maliciously and fraudulently using official right to oppress me and to deny me rights guaranteed under the Constitution and laws of the United States and did attempt to extort my money owed to me by Merrill Lynch by threat of arrest unless I pay it all to them.

49. I refused to pay this extortion demand.

50. I was indicted for theft without opportunity to talk to Grand Jury.

51. The District Attorney's records show that the District Attorney was deceived by letter from Bonnie Dailey, in house counsel for S. Pacific in which she claimed that I had previously attempted theft of $31,806.79 as evidence of my intent to steal.

52. S. Pacific had mailed me a S31,806.79 check from them payable to me.

53. I immediately took the $31,806.79 check back to S. Pacific and gave it to Jeff Roys and inquired as to why it had been sent to me.

54. I had previously told Mr. Roys that I did not want to withdraw any amount in excess of profit.

55. Mr. Roys told me that it had been sent by mistake and that it should have been credited to my account as the result of a trade but that mistake was made by S. Pacific and that the unsolicited check was sent to me because of a pay notation

written upon the trade confirmation slip by their New York trader.

56. I instructed that the $31,806.79 was to be deposited back to my account No. 48100090.

57. I did not cash the check nor did I attempt to cash it.

58. I left the check with Mr. Roys.

59. The written information given to the District Attorney by Bonnie Dailey was that I had stolen the check and only S. Pacific's stop payment prevented theft.

60. The information was false and was intended to convey the impression that I had attempted to steal $31,806.79.

61. Subsequently S. Pacific sent me a check for $8,000.00 and I accepted and cashed the check without discussion because the account had excess profit in the amount of over $8,000.00.

62. After a dispute with S. Pacific over failure to cover my short position, Mr. Roys claimed the $8,000.00 was S.

Pacific's and alleged to the District Attorney that I took it without permission indeed that I stole that particular $8,000.00 from S. Pacific.

63. I was indicted without opportunity to submit any evidence favorable to my interest to the Grand Jury.

64. That $8,000.00 was and is mine.

65. A specially prepared dummied-up statement of account showing trades made without showing debits and credits was submitted by S. Pacific to the District Attorney to support their claim for the $8,000.00 and for the $86,661.25, both sums are my money.

66. The dummied-up statement of account was also in the District Attorney's record which I examined.

67. After long prosecution and much difficulty I was able to submit proof to the District Attorney which showed the $8,000.00 to be a check from S. Pacific to me and also showed it to be an aggregate amount of profit as a result of multiple

trades within Account No. 48100090.

68. The District Attorney made motion to dismiss because the representations of S. Pacific did not match the facts and there was no probable cause to support a theft indictment for that $8,000.00 nor for any part of the $86,661.25.

69. A second indictment for theft of the $86,661.25 or part thereof had been quashed upon production of the checks which did not show S. Pacific to be payee nor were the checks shown to be endorsed payable to S. Pacific and therefore they cannot be regarded as a promise to pay S. Pacific anything.

70. S. Pacific has made an illegal use of criminal prosecution for ulterior motive.

71. S. Pacific has malice against me because of the short position dispute with them and because of conspiracy with Merrill Lynch which has it's own ax to grind because of civil litigation I have pressed against them:

72. S. Pacific tried to extort $86,661.25.

73. S. Pacific used the threat of $86,661.25 theft prosecution, all the while knowing that S. Pacific's $86,661.25 claim was bogus in order to attempt easy collection of lesser amount: $56,256.00.

74. S. Pacific used the threat of criminal prosecution in attempt to collect $56,256.00 default judgement.

75. Outside the courtroom after the April 16, 1987 hearing before this court. Mr. Parrish told plaintiff that S. Pacific would have the criminal charges against plaintiff dropped, if it could, if plaintiff would pay them.

76. Alan Ray Dillard was standing next to plaintiff when Mr. Parrish conferred with plaintiff outside the courtroom and he overheard the entire conversation between Mr. Parrish and plaintiff.

77. Plaintiff submits to the court that this action by Mr. Parrish makes clear that the criminal prosecution was

instigated to obtain advantage in collection of a debt and that the criminal prosecution constituted an abuse of process.

78. Through the malicious instigation of defendants, criminal charges were brought against plaintiff and those charges were then used maliciously, perversely, and unlawfully as a club in an attempt to force plaintiff to pay an alleged credit debt to defendant.

79. S. Pacific: Used three no probable cause criminal prosecutions to try to collect a $56,256.00 default judgement.

80. Used malicious criminal prosecution as a club in attempt to settle civil litigation.

81. Offered to drop criminal prosecution and renounce all claims against me, including the $56,256.00 default judgement claim if only I will drop civil litigation, but only after all else was this offer made.

It is clear that:

82. I was criminally prosecuted because of the deliberate actions, aid, and cooperation of S. Pacific.

83. The criminal prosecutions have been quashed and dismissed and further criminal prosecution is impossible.

84. I am innocent of each and every criminal charge, indeed I did not do anything legally, morally or ethically. wrong.

85. S. Pacific knew all along that there was no probable cause to support any of the several bogus criminal charges that they demanded that the district attorney prosecute.

86. The indictments were the direct result of malice by S. Pacific, malice which originated because of dispute over their gross negligence in a short sale.

87. The damage done to me by the malicious prosecution is great. I was arrested. I had expense of bond, defense, travel, etc. My reputation has been damaged

and I have been injured in my business, the damage to me is certain and obvious and not all recounted here. The court should note that S. Pacific has specifically denied:

88. That any trading in Account No. 48100090 was ever done on credit; yet credit trading is shown on account statement page 1 where it is shown that trading started several days prior to any deposit to account.

89. That any short sale of SP 100 index March 160 puts ever took place; yet short sale is shown on account statement pages 5 and 6 where 200 SP 100 March 160 puts are shown sold short in account No. 48100090 for a credit to account of over $178,000.00.

90. S. Pacific under the direction of William Parrish, lied to the 5th Circuit and lied in answers to complaint in H-86-3251 and in H-88-2848 and until my receipt of the account statement it was my word against theirs.

91. William Parrish's attitude was that not getting caught in a lie was the same as telling the truth and he thought that the multiple false statements he made in behalf of S. Pacific would be buried in pleadings - never to be checked because he apparently thought that if all else failed and he could not grind me down with repetitive criminal charges nor have my civil complaint dismissed on technicality - he believed that he could buy peace at any time by simply dropping the criminal charges in return for my dropping civil litigation. Largely at his direction S. Pacific perpetrated a great deceit:

92. By providing a specially prepared dummy statement of account for the District Attorney which deliberately deleted critical data.

93. By providing several courts with a statement of account with disputed items smeared and illegible or just missing because the copier was deliberately misaligned so that disputed items were cut

off the page.

94. By resisting any discovery.

95. S. Pacific denied that they had failed to buy to cover a short position, indeed they denied that there even was a short position.

96. This was a rough position for them to maintain because several people have direct personal knowledge of these facts.

97. One such person is Jeff Albaugh who was a broker for S. Pacific.

98. Mr. Albaugh had disappeared.

99. Private detectives in my employ found him in Burbank, California.

100. My investigation indicated that both Jeff Roys, Manager for S. Pacific, and Jeff Albaugh had both told Mr. Parrish the truth: That S. Pacific had negligently failed to cover the short position - but that Mr. Parrish told them it did not matter and denied it in behalf of S. Pacific to the court.

101. I asked Mr. Albaugh for a

statement concerning the failure to cover the short sale that S. Pacific had repeatedly claimed was non-existent.

102. He asked for time to contact S. Pacific.

103. Mr. Art Fritz of S. Pacific advised Mr. Albaugh to hide from me.

104. I overheard part of a telephone conversation between Mr. Fritz and Mr. Albaugh. Mr. Albaugh told Mr. Fritz that hiding had done no good and as Mr. Albaugh had predicted to Mr. Fritz, Mr. Albaugh had been served with subpoena.

105. Hearing was held in Federal Court for the Central District of California with Judge Penne presiding. After a hot debate between me and S. Pacific's west coast lawyers, Judge Penne declared that under the law I had the right to depose Mr. Albaugh and that Mr. Albaugh would be deposed 30 days hence.

106. S. Pacific did nothing for the 30 days except to send me a letter confirming date of deposition. When I was in

California for the deposition on the afternoon of the day before a scheduled 9:00 a.m. deposition, S. Pacific petitioned Judge Sterling in Houston, ex parte, and got a protective order.

107. When ordered by the 184th District Court of Texas to provide me a pre-trial discovery and inspection S. Pacific provided no discovery. It simply ignored the order. The judge blustered about finding them in contempt and spoke of fine and/or arrest but repeatedly delayed to take any such action - leaving the District Attorney in an impossible position as far as proceeding with the prosecution.

108. The District Attorney then began a concerted effort with S. Pacific to force me into dropping this civil litigation, H-86-3251, which constituted gross prosecutorial abuse.

109. I refused many times to drop my civil action in return for S. Pacific and the District Attorney stopping prosecution.

110. Each time I refused I was threatened with continued prosecution - and indeed the prosecution continued.

111. I was docketed in the 184th District Court about every three weeks for all of some years. I had a court mandated appearance in the 184th District Court about two dozen times. I spent so much time appearing for hearings that rotation caused the case to be through several young District Attorneys who found they could not abandon prosecution nor keep their promise to let me defend myself before a grand jury by order of Carl Hobbs, District Attorney Chief in the 184th District Court.

112. The record of the prosecution in the 184th District Court is one of abuse of process.

113. The false swearing of Jeff Roys of S. Pacific at the direction of William Parrish of Jenkens & Gilchrist and the false and deceptive declarations of Bonnie Dailey, on behalf of S. Pacific created a web of deceit that first confused and then

embarrassed some Assistant District Attorneys.

114. S. Pacific has denied the $178,000.00 short sale.

115. Discovery of the account record clearly shows the deliberate deception -- no error but deliberate deception of S. Pacific in repeated denial to several courts that the $178,000.00 transaction ever took place.

116. I was pilloried on the basis of unfounded charges.

117. S. Pacific still claims I owe them $86,661.25 or at least they have not recanted yet.

118. The statement of account does not show that I owe S. Pacific $86,661.25.

119. Indeed, it does not indicate that I owe S. Pacific anything.

120. A $178,000.00 short sale S. Pacific claims never happened shows up.

121. The $31,806.79 check I never cashed is shown as debit.

122. The reality is that without any discovery it was my word against S. Pacific's who swore I stole: $86,661.25 and $8,000.00 and $56,256.00 and who swore that my complaint about failure to short cover as ordered was a bold-faced lie because no short sale took place and have again and again managed to cover their perfidy and extortionary demands by no discovery.

123. In equity I do not owe S. Pacific the $56.256.00 default judgement because of valid counterclaim but there was no discovery in H-84-1079 either.

124. I want an accounting and discovery to press my demand for compensation for the damage caused me by crimes committed against me by S. Pacific, it's agents, and co-conspirators.

125. During the time period involved herein certain of the defendant corporations or their co-conspirators sold for fees and commissions millions of dollars worth of stocks, bonds, options, and financial services out of and for my

brokerage accounts in Houston, Texas.

126. The conspiracies and other crimes alleged herein had a substantial effect on said commerce. Attempt to hide their monetary crime caused defendants and their co-conspirators to initiate an escalating series of crimes against the civil rights and against the person of plaintiff.

VIOLATIONS ALLEGED:

(All paragraphs of this complaint are incorporated by reference)

127. Violation of Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. Section 1961. Defendants and their agents did commit multiple felonies in violation of this Federal Law including: Conspiracy. Conspiracy to extort under color of official right in violation of 18 U.S.C.A. Section 1951, conspiracy to defraud, conspiracy to deprive plaintiff of his liberty, conspiracy to extort, conspiracy to obstruct interstate commerce by extortion, 18 U.S.C.A., Section 1951, Note

11: "This section prescribes not only obstructing or attempting to do so; in short a violation is complete when one attempts to induce a person to part with property." False Swearing. In August 1984 defendants made a complaint charging theft by plaintiff of $86,661.25 Extortion.

128. The false criminal charge was one of a number of outrageous actions done by defendants to harass and oppress in order to compel payment of or in retaliation for plaintiff's refusal to meet defendants' extortion demands. Please see U.S.C.A. 18 Section 1951, Note 13: "Congress... meant to punish as extortion any effort to obtain property by inherently wrongful means, such as ... threats of ... criminal prosecution, regardless of the defendants claim or right to the property.

129. Plaintiff additionally makes claim against defendants for damages to plaintiff due to defamation, abuse of process, malicious prosecution and Title 42

violation of civil rights.

DAMAGES

130. It will be made apparent to the court that this is a racketeering enterprise injury in violation of Federal and State Law statutes which specifically prohibit such activity. Injury by reason of a violation of U.S.C.A. 18 Section 1962 has provision for and plaintiff therefore demands costs of suit, attorneys fee and mandatory award of threefold the damages.

131. The multiple felonies, and reckless disregard for plaintiff's rights committed by defendants and their agents warrant the awarding of punitive and exemplary damages. The character of defendants' acts and the nature and extent of the harm to plaintiff, are just reason for the awarding of substantial punitive and exemplary damages.

PRAYER

132. Plaintiff requests that the court entitle him to obtain from defendant for

mental injury, harm to reputation, harm to profession and for other injuries and costs, a judgement of at least twenty-five million dollars all trebled for a total judgement of seventy-five million dollars.

133. And plaintiff prays for all other and further relief, general or special, at law or in equity, to which plaintiff may be justly entitled, and for all other and further proper relief.

Respectfully submitted,

CARVEL G. DILLARD, Plaintiff
903 SW Central
Grants Pass, Oregon 97526
(503) 479-0098

Date of Entry: January 8, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL DILLARD	$	
	$	
V.	$	CIVIL ACTION
	$	NO. H-86-3251
SECURITY PACIFIC BROKERS,	$	
INC., and FINANCIAL	$	
CLEARING & SERVICES	$	
CORPORATION	$	

ORDER

Pending before the Court is Defendant Security Pacific Brokers, Inc. and Financial Clearing and Services Corporation's motion for the entry of a Rule 26(c), Fed.R.Civ.P., protective order barring the noticed deposition of Jeff D. Albaugh. In light of allegations contained in this motion, and an accompanying motion for summary judgment, that the claims presently asserted by Plaintiff, Carvel Dillard, have already been fully litigated, it is, therefore,

ORDERED, ADJUDGED and DECREED that the Defendants' motion is GRANTED. It is

further ORDERED that all discovery pertaining to the present dispute be stayed until the Plaintiff has responded to and the Court has ruled upon the Defendants' claims of res judicata and collateral estoppel.

DONE at Houston, Texas, this 5th day of January 1987.

ROSS N. STERLING
United States District Judge

Date of Entry: May 20, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL DILLARD	$	
	$	
V.	$	CIVIL ACTION
	$	No. H-86-3251
SECURITY PACIFIC	$	
BROKERS, INC .	$	
AND FINANCIAL	$	
CLEARING AND	$	
SERVICES	$	
CORPORATION	$	

O R D E R

On April 16, 1987, this Court held a hearing on Defendants, Security Pacific Brokers, Inc. and Financial Clearing and Services Corporation's Motion for Summary Judgment. This motion was granted from the Bench, and the Court did so for the following reasons.

The current claims asserted by Plaintiff, Carvel Dillard, are the product of a February 14, 1984 agreement with the Defendants to trade in options. Pursuant to this agreement, Mr. Dillard was to direct the purchase of various put and call

options in his account. Mr. Dillard complains that on February 27, 1984, he directed his brokers and the Defendant's employees to buy 200 Standard and Poors March 160 index option puts for 3-3/8ths each. This order was not carried out and neither was a subsequent order for this same purchase at a price of 3-1/2. Mr. Dillard claims that this amounted to negligence and that he suffered a minimum loss of $50,000.00. He, therefore, seeks recovery under various theories including common law fraud, negligence, and the Securities Act of 1933, 15 U.S.C. $ 77(a), et seq. (1982), and the Securities Exchange Act of 1934, 15 U.S.C. $ 78(a), et seq. (1982). This same transaction was, however, the source of a prior action in this district. Mr. Dillard admittedly paid for the ordered stock transactions with three bad checks. The Defendants suffered a $56,256.00 loss as a result and they instituted a suit for the recovery of this amount and reasonable attorney's fees in

Judge Bue's Court. Mr. Dillard answered these claims. He raised the alleged negligence of the Defendants in failing to carry out his stock purchase orders as he was required to do by Rule 13(a), Fed.R.Civ.P., but he failed to comply with the Defendants' discovery request or Judge Bue's discovery orders. Judgment was, consequently, entered against him, and the Defendants argue that this judgment bars the current claims under the doctrines of res judicata and collateral estoppel.

This Circuit is quite clear as to the prerequisites for application of the doctrine of res judicata. If a prior judgment is to bar a subsequent action it must have (1) been rendered by a court of competent jurisdiction; (2) been a final judgment on the merits; (3) involved the same parties or those in privity with them; and (4) the same cause of action must have been involved in both suits. Jones v. Texas Tech University, 656 F.2d 1137, 1141

(5th Cir. 1981). Judge Bue's original judgment was no doubt delivered by a competent court, was final, involved the same parties presently before this Court, and involved the same causes of action which were asserted in Mr. Dillard's answer or which were required to have been asserted under Rule 13(a). Since Mr. Dillard has not disputed any of this in his Memorandum in Opposition to Defendants' Summary Judgment Motion or in the April 16, 1987 hearing before this Court, it is, therefore,

ORDERED, ADJUDGED and DECREED that in accordance with this Court's prior Bench ruling, the Defendants' Motion to Dismiss is GRANTED.

DONE at Houston, Texas, this 20th day of May, 1987.

ROSS N. STERLING
UNITED STATES DISTRICT JUDGE

Date of Entry: May 20, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL DILLARD	$	
	$	
V.	$	CIVIL ACTION
SECURITY PACIFIC	$	NO. H-86-3251
BROKERS, INC.	$	
AND FINANCIAL	$	
CLEARING AND SERVICES	$	
CORPORATION	$	

FINAL JUDGMENT

In accordance with the Order of the Court entered this date, it is, hereby

ORDERED, ADJUDGED and DECREED that this case is: DISMISSED.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this 20th day of May, 1987.

ROSS N. STERLING
UNITED STATES DISTRICT JUDGE

Date of Entry: January 15, 1988

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2673
Summary Calendar

D.C. Docket No. CA-H-86-3251

CARVEL DILLARD,

Plaintiff-Appellant

versus

SECURITY PACIFIC BROKERS, INC.,
AND FINANCIAL CLEARING &
SERVICES CORPORATION,

Defendants-Appellees

Appeal from the United States District
Court for the Southern District of Texas

Before GEE, GARWOOD, and JONES, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is

remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bears its own costs on appeal.

January 15, 1988

ISSUED AS MANDATE: April 11, 1988

Date of Entry: August 2, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD	$	
PLAINTIFF	$	
	$	
vs.	$	CIVIL ACTION
	$	NO. H-86-3251
SECURITY PACIFIC	$	
BROKERS, INC., ET AL	$	
DEFENDANTS.	$	

ORDER

Plaintiff Carvel G. Dillard has filed a supplemental complaint in the above referenced cause. The Court

ORDERS that the supplemental complaint is stricken from the record because Plaintiff failed to request leave of Court to file it. Furthermore, the Court admonishes Plaintiff that it has been informed by one of the proposed new Defendants that that party has not been served with a copy of this pleading, contrary to Plaintiff's assertions in his verified instrument. Even though

Plaintiff is proceeding Pro se, he will be held to required standards of truth and correct procedure in this action.

DONE this 2nd day of August, 1988 at Houston, Texas.

J. DeAnda
Chief Judge
United States District Court

Date of Entry: August 2, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD	$	
PLAINTIFF	$	
	$	
VS.	$	CIVIL ACTION
	$	NO: H-86-3251
SECURITY PACIFIC	$	
BROKERS, INC., ET AL.	$	
DEFENDANTS.	$	

ORDER

The Court ORDERS that the above referenced cause is TRANSFERRED back to the docket of the Honorable Ross Sterling.

DONE this 2nd day of August, 1988 at Houston, Texas.

J. DeAnda
Chief Judge
United States District Court

Date of Entry: August 4, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD	$	
PLAINTIFF	$	
	$	
VS.	$	CIVIL ACTION
	$	NO. H-86-3251
SECURITY PACIFIC	$	
BROKERS, INC., ET AL.	$	
DEFENDANTS.		

ORDER

Because this case is no longer on the undersigned judge's docket, the conference setting on August 31, 1988 is vacated.

DONE this 4th day of August, 1988 at Houston, Texas.

J. DeAnda
Chief Judge
United States District Court

Date of Entry: October 27, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD	$	
	$	
v.	$	NO. H-86-3251
	$	
SECURITY PACIFIC	$	
BROKERS, INC. AND	$	
FINANCIAL CLEARING	$	
AND SERVICES CORP.	$	

ORDER

On this date the court considered Plaintiff's Motion for Stay Until there is a Decision of the Appeals Court in a Related Action.

It is ordered that this action is hereby stayed until there is a decision of the United States Court of Appeals for the Fifth Circuit in Carvel Dillard versus Security Pacific Corp. et al No. 89-2583 USDC # CA H-88-2848.

A new scheduling order showing time for filing amended Complaint, will be issued subsequent to the issuance of the

appeals court's ruling. The present docket control order will continue to apply to the present parties.

Signed on this 26th day of October, 1989.

Sim Lake
U.S. District Judge

Date of Entry: September 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	CIVIL ACTION
	$	NO. H-86-3251
SECURITY PACIFIC	$	
BROKERS, INC., et al.,	$	
	$	
Defendants.	$	

ORDER

Pending before the Court are Defendants' Rule 41(b) Motion to Dismiss (Docket Entry No. 47) and Plaintiffs' Motion to Extend Time for Filing Opposition to Motion to Dismiss, Motion to Consolidate H-88-2848 and H-86-3251, Motion for Stay (Docket Entry No. 48).

The Court ORDERS plaintiff to file an amended complaint by October 5, 1990, or the action will be dismissed.

Plaintiff's motions for stay and to consolidate this action with C.A. H-86-3251 are DENIED.

SIGNED at Houston, Texas, this 10th day of September, 1990.

SIM LAKE
UNITED STATES DISTRICT JUDGE

Date of Entry: December 31, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	CIVIL ACTION
	$	NO. H-86-3251
SECURITY PACIFIC	$	
BROKERS, INC. and	$	
FINANCIAL CLEARING &	$	
SERVICES CORPORATION,	$	
	$	
Defendants.	$	

MEMORANDUM AND ORDER

On September 15, 1989, Plaintiff Carvel G. Dillard filed a Motion for Summary Judgment as to all of his causes of action. After careful consideration the Court denied Dillard's Motion on the ground that it was frivolous. (Docket Entry No. 43). The Court also ordered Dillard to file an amended complaint by October 15, 1989. Dillard did not comply within the time required. On October 27, 1989, the Court stayed the case pending the Fifth Circuit's decision in the appeal of an earlier case

brought by Dillard involving facts and circumstances common to this case. (Docket Entry No. 46). On May 22, 1990, the Fifth Circuit disposed of the appeal. On September 13, 1990, the Court required Dillard to amend his Complaint by October 5, 1990, or face dismissal. No leave was granted to add new parties. (Docket Entry No. 52).

Plaintiff's Motion To Amend

Pending before the Court are Dillard's Motion for Leave to Amend Complaint (Docket Entry No. 53) and Defendants' Rule 12 Motion Regarding Dillard's First Amended Complaint. (Docket Entry No. 55). Dillard's motion to amend is GRANTED except as to his attempt to add defendants, Merrill Lynch, Pierce, Fenner and Smith, Inc.; Jenkens & Gilchrist (a Partnership); Jenkens & Gilchrist (a Professional Corporation); and Security Pacific Corp., as to which Dillard's motion is DENIED. Those newly

added defendants are DISMISSED WITHOUT PREJUDICE.

Defendants' Rule 12 Motion

Paragraphs 22-33 of Dillard's Amended Complaint are DISMISSED on res judicata grounds. The matters alleged in these paragraphs should have been raised by Dillard as compulsory counterclaims to the 1984 suit brought by defendants against him. See Dillard v. Security Pacific Brokers, Inc., 835 F.2d 607, 608 (5th Cir. 1988) (The 1984 suit terminated all counterclaims arising out of the securities trading transactions.).

Defendants' motion to dismiss Dillard's libel and slander claims[1] on the ground that they are time-barred is GRANTED, and these claims are DISMISSED. Under Texas law the statute of limitations for libel and slander is one year. TEX. CIV. PRAC. & REM. CODE $ 16.002 (Vernon

[1] Dillard's complaint collectively refers to these claims as "defamation."

1986). Such a cause of action accrues when the plaintiff learns of, or in the exercise of reasonable diligence, should have discovered the wrong giving rise to the suit. Bowser v. McDonalds Corp., 714 F. Supp. 839, 842 (.D.Tex. 1989); Citizens Bank of Dickinson v. Shapiro, 575 S.W.2d 375, 380 (Tex. App.--Tyler 1978, writ refd n.r.e.).

Paragraph 35 of Dillard's Amended Complaint alleges that defendant "S. Pacific used the knowingly fraudulent allegation of theft of $86,661.25 to have the state of Texas harass and oppress me by threat of jail unless I pay S. Pacific all of $86,661.25." First Amended Complaint (Docket Entry No. 54). Paragraph 36 of the complaint alleges that Security Pacific's pursuit of this claim to the $86,661.25 through the district attorney's office caused the defamation of his character. Id. Dillard's pleadings reflect that two indictments were returned against him in

connection with the alleged theft. Id., paras. 50, 68 and 69. The first indictment (Texas v. Dillard, No. 431068), issued on August 19, 1985, was quashed on September 16, 1987. Supplemental Complaint, paras, 47-53, pp. 21-22 (Docket Entry No. 32).[2] Exhibit A attached to Dillard's affidavit reflects that on August 28, 1984, he received notice of the Security Pacific complaint filed with the District Attorney's Office that led to this indictment. Affidavit In Support Of Motions, (Docket Entry No. 41). The Court concludes that in August 1984, Dillard knew or should have known of the alleged defamatory allegations asserted against him by Security Pacific. Limitations therefore began to run in August 1984. Since this action based on the first indictment was

[2] Although the pleading asserting these facts was stricken by the Court's order of August 2, 1988 (Docket Entry No. 34), defendants do not dispute these assertions. See Defendants' Rule 12 Motion, p. 6 (Docket Entry 53).

not filed until October 5, 1990, when Dillard filed his First Amended Complaint (Docket Entry No. 54), it is barred by the limitation.

The second indictment (Texas v. Dillard, No. 484550) issued on September 17, 1987, and was dismissed on June 21, 1988. Supplemental Complaint, paras, 47-53, pp. 21-22 (Docket Entry No. 32). It is unclear from Dillard's pleadings and the record when he learned of defendants involvement in the second indictment. However, the Court concludes that at the very latest, Dillard knew or should have known of the defendants' alleged defamatory conduct in pursuing this prosecution by July 18, 1988, when he attempted to file his Supplemental Complaint alleging this cause of action. Since this action based on the second indictment was not filed until October 5, 1990, it is barred by limitations.

Dillard asserts that because the cause of action based on the second indictment

was timely raised in a related action, Civil Action No. H-88-2848, it is not time-barred in this action. He contends that since his 1988 action should have been consolidated with the instant action, the limitations period has not run for his defamation causes of action in either Civil Action No. H-88-2848 or this action. The Court finds Dillard's arguments unpersuasive and rejects them.[3]

Defendants' motion to dismiss Dillard's malicious prosecution claims on the ground that they are time-barred is also GRANTED, and these claims are DISMISSED. Under Texas law the statute of limitations on claims for malicious prosecution is one year. TEX. CIV. PRAC. REM. CODE $ 16.002 (Vernon 1986). Such a cause of action accrues when the prosecution is terminated. Rendin v.

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[3] Whether or not his defamation claims based on the second indictment were timely raised in Civil Action No. H-88-2848 is not before this Court, and the Court expresses no opinion on that question.

Saenger, 250 S.W.2d 465 (Tex. App.--El Paso 1952, writ refd n.r.e.); Van Koehring v. Witte, 40 S.W.2d 63 (Tex. civ. App.--1897, writ refd). Dillard's pleadings reflect that the first indictment (Texas v. Dillard, No. 431068) was quashed on September 16, 1987. The second indictment (Texas v. Dillard, No. 484550) was dismissed on June 21, 1988. Supplemental Complaint, paras, 47-53, pp. 21-22 (Docket Entry No. 32). The Court concludes that the statute of limitations for these causes of action began to run on September 16, 1987, and on June 21, 1988. Since Dillard's First Amended Complaint was filed on October 5, 1990, his causes of action for malicious prosecution are barred by limitations.

Defendants' motion to dismiss Dillard's claims for abuse of process is GRANTED, and these claims are DISMISSED. To state a cause of action for abuse of process a plaintiff must show that (1) defendants made an illegal, improper or perverted use of process, and the use was

neither warranted nor authorized by the process; (2) defendants had an ulterior motive or purpose in exercising such a legal, perverted or improper use of process; and (3) damage resulted to plaintiff as result of such irregular act. Rodriguez v. Carroll, 510 F. Supp. 547 (S.D.Tex. 1981). Mere procurement or issuance of process with a malicious intent, or without probable cause, is not actionable without some improper use of the process after its issuance. Overt acts done to obtain collateral and unlawful objectives to those appearing on the face of the instituted action may amount to abuse of process. Such acts, however, must be other than those incidental to the normal use of the courts in maintaining an action. Associated Radio Service Co. v. Page Airways, Inc., 414 F. Supp. 1088, 1096 (N.D.Tex. 1978).

Dillard has failed to allege sufficient facts to establish the elements

of a claim for abuse of process to extort the sum of $86,661.25. He has pled no facts showing any conduct by defendants outside the normal use of the courts in seeking the return of the alleged stolen funds. However, contrary to defendant's arguments Dillard has alleged sufficient facts to establish the elements of a claim for abuse of process to settle civil litigation and collect a $56,256.00 default judgment against him in an earlier action. While the allegations are inartfully drafted, paragraphs 72-81 of his First Amended Complaint allege that after defendants had initiated criminal prosecutions against Dillard, representatives of Security Pacific informed him that Security Pacific would have the criminal charges against plaintiff dropped if he would agree to pay them the $56,256.00 default judgment. Dillard also alleges that defendants subsequently offered to drop all criminal prosecutions and renounce all claims against him, including the $56,256.00 default judgment

claim, if Dillard agreed to discontinue this current civil litigation. First Amended Complaint, paras. 71-81, pp. 10-11 (Docket Entry No. 52). Such allegations, if true, would establish the elements of a claim for abuse of process.

Nevertheless all of Dillard's claims for abuse of process are time-barred under the applicable statute of limitations. Under Texas law the statute of limitations for abuse of process is two years. TEX. CIV. PRAC & REM. CODE $ 16.003 Vernon 1986); Hatch v. Reliance Insurance Co., 758 F.2d 409, 415 (9th Cir.), cert. denied, 106 8. Ct. 571 (1985). It is unclear from Dillard's pleadings and the record when he learned of defendant's attempt to use the criminal prosecutions to collect the default judgment and settle the instant action. However the Court concludes that at the very latest Dillard knew or should have known of defendants' attempts to abuse process on June 21, 1988, when the last

criminal charges against him were dropped. The Court finds that limitations began to run at that time. Since Dillard's First Amended Complaint was filed on October 5, 1990, his claim for abuse of process is barred by the limitation.

Defendant's motion to dismiss Dillard's claim asserting a cause of action under 18 U.8.C. $ 1951 is GRANTED, and this claim is DISMISSED because the statute does not provide a private cause of action. See Peterson v. Philadelphia Stock Exchange, 717 F. Supp. 332 (E.D.Pa. 1989).

Defendant's motion to dismiss Dillard's RICO claim is GRANTED, and this claim is DISMISSED WITHOUT PREJUDICE. To state a claim under RICO section 1964(c), a plaintiff must plead facts sufficient to show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Montesano v. Sea First Commercial Corp., 818 F.2d 423, 424 (5th Cir. 1987); 18 U.8.C. $ 1962(C). A plaintiff must plead specific facts, not

mere conclusory allegations, to support each element of a RICO cause of action. Elliott v. Foufas, 867 F.2d 877 (5th Cir. 1989). Dillard's Amended Complaint is deficient as to each of these elements. First, the complaint is incomprehensible with respect to which matters constitute valid RICO claims against the respective defendants; the claimed RICO violations by the defendants are unidentifiable. Second, the complaint does not even approximate the pleading requirements for an enterprise, which is essential to establish a RICO action. Old Time Enterprises v. International Coffee Corp., 862 F.2d 1213, 1218 (5th Cir. 1989); Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438, 440-41 (5th Cir.) (per curiam), cert. denied, 107 S. Ct. 3276 (1987). Finally, the complaint does not allege with sufficient particularly at least two predicate acts of racketeering by defendants to establish a pattern of racketeering activity under the

statute. It is perhaps possible that a RICO claim may lie buried somewhere in the Dillard's complaint. However, the complaint does not state such a claim against defendants with sufficient particularly or intelligibility for a court or opposing party to understand whether a valid claim is alleged, and, if so, what that claim is.

Defendants' motion to dismiss Dillard's claims against defendants' "for damages to plaintiff due to . . . Title 42 violation of civil rights" is GRANTED, and these claims are DISMISSED WITHOUT PREJUDICE for failure to state a cause of action. To state a cause of action under the civil rights statute Dillard must allege facts with particularity that would, if proved, warrant the relief he seeks. Johnson v. Wells, 566 F.d 1016, 1017 (5th Cir. 1978). Mere conclusory allegations of a deprivation of civil rights such as those contained in Dillard's complaint are insufficient to withstand a motion to dismiss. Id.; Arseneaux v. Roberts, 726

F.2d 1022, 1024 (5th cir. 1982).

Defendant's motion to strike pursuant to Fed. R. Civ. P. 12(f) is GRANTED as to paragraphs 8-18, 21-23, 29, 40-45, 88-90, 94-108, 111, and 114-125 of Dillard's First Amended Complaint, and DENIED as to paragraphs 1, 2-5, 49-68, and 91-93.

Defendants' motion for a more definite statement pursuant to Fed. R. Civ. P. 12(e) is DENIED. Plaintiff's Second Motion for Stay & Consolidation (Docket Entry No. 56) is DENIED.

SIGNED at Houston, Texas, this 31st day of December 1990.

SIM LAKE
UNITED STATES DISTRICT JUDGE

Date of Entry: December 31, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	CIVIL ACTION
	$	NO. H-86-3251
SECURITY PACIFIC	$	
BROKERS, INC. and	$	
FINANCIAL CLEARING &	$	
SERVICE8 CORPORATION,	$	
	$	
Defendant.	$	

FINAL JUDGEMENT

In accordance with the courts Memorandum and Order, this action is DISMISSED.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 31st day of December, 1990.

SIM LAKE
UNITED STATES DISTRICT JUDGE

CIVIL DOCKET SHEET
H-88-2848

PLAINTIFF	DEFENDANT
CARVEL G. DILLARD	SECURITY PACIFIC CORP. et al

DATE	NR.	PROCEEDINGS
8-18-88	1	ORIGINAL COMPLAINT, with JURY DEMAND, filed. (7) SUMMONS, issued.
8-22-88	2	PETITION TO THE CHIEF JUDGE, filed. jlp dkt'd 8-24-88
9-12-88	3	DEFT MERRILL LYNCH'S MOTION TO DISMISS PLFT'S COMPLAINT AND FOR SANCTIONS, filed. bj dkt'd 9-13-88 M/D Oct 3, 1988 by Clerk.
	4	BRIEF IN SUPPORT OF DEFT MERRILL LYNCH'S MOTION TO DISMISS PLTF'S COMPLAINT AND FOR SANCTIONS, filed. bj dkt'd 9-13-88
	5	AFFIDAVIT OF KARL S. STERN, w/exhibits attached, filed. bj dkt'd 9-13-88
9-12-88	6	Defts Rule 12(e) MOTION for more Definite Statement and Rule 12(f) MOTION to Strike of Defts Jenkens & Gilchrist (A Professional Corporation), Jenkens & Gilchrist (A partnership), Security Pacific Corporation, Security Pacific Brokers, Inc., and Financial Clearing and Services Corporation and Brief in Support Thereof, filed. bj M/D 10-3-88 by clerk dkt'd 9-14-88

9-12-88	7	Local Rule 5 Disclosure of Related Litigation and Other Unusual Features, filed. bj dkt'd 9-14-88
9-12-88	8	Response of Jenkens & Gilchrist, A Professional Corporation, and Jenkens & Gilchrist, a Partnership, filed. bj dkt'd 9-14-88
9-12-88	9	Original Answer of Financial Clearing and Services Corporation, filed. bj dkt'd 9-4-88
9-12-88	10	Original Answer of Security Pacific Brokers Inc. dkt'd 9-14-88
9-12-88	11	Original Answer of Security Pacific Corporation, filed. bj dkt'd 9-14-88
9-15-88	12	Deft Securities Industry Association, Inc.'s MOTION to Dismiss Pltf's Complaint and Request for Sanctions, filed. bj M/D 10-3-88 by clerk dkt'd 9-16-88
10-3-88	13	Pltf's Memorandum in Opposition to Defts' Motions: To Compel More Definite Statement, To Impose Sanctions, to Dismiss, To Strike, filed. bj dkt'd 10-4-88
10-5-88	14	Deft Merrill Lynch's MOTION for Stay Pending Arbitration and to Compel Arbitration, filed. bj M/D 10-31-88 by clerk dkt'd 10-6-88

10-27-88	15	Pltf Carvel G. Dillard's Memorandum in Opposition to Deft Merrill Lynch's Motion for Stay Pending Arbitration and to Compel Arbitration, filed. bj dkt'd 10-28-88
12-14-88		NOTICE OF HEARING, mailed to all parties. Jan 3, 1989 at 11am mg/bj dkt'd 12-14-88
12-23-88		NOTICE OF HEARING TO BE HELD ON JAN 30, 1989 at 4:30pm, courtroom #7; HEARING SET 1-3-89 IS CANCELLED. MG/jlp dkt'd 12-28-88
1-19-89	16	Pltf Carvel G. Dillards MOTION for: Partial Summary Judgment and Injunctive Relief Docketing of Action H-86-3251 in this Court Inclusion of Title 42 Claims Sanctions, filed. bj dkt'd 1-24-89
1-25-89	17	Deft Merrill Lynch's Response to Pltf's Motion for Partial Summary Judgment and Sanctions, filed. bj dkt'd 1-26-89
1-30-89	18	(LNH) HEARING, filed. bj (Rptr-H. Chester) Appearances: pltf. = Dillard; deft. = Stern Goldberg, Stewart Deft Security Pacific Corp,; Securities Industry Assoc. Inc.; Security Pacific Broker Inc. and Financial Clearing and Service corp. are dismissed, Claims against Merrill Lynch and Jenkins & Gilchrist are abated until

		such time as Judge DeAnda rules on pleadings between the same parties in the associated case.
2-1-89		Rec'd Order of Dismissal, fwd/crd dkt'd 2-2-89 bj
2-2-89	19	(LNH) ORDER OF DISMISSAL AND ABATEMENT, entered. bj parties ntfd A. These defts are dismissed: Security Pacific Corp. Merrill Lynch, Pierce, Fenner & Smith, Inc. Security Pacific Brokers, Inc. Financial Clearing and Services Corp. B. The judgment is A is final under rule 54(b). C. The case is abated for these defts: Securities Industry Association, Inc. Jenkens & Gilchrist.
2-16-89	20	PLTF'S RULE 59 MOTION TO ALTER & AMEND THE ORDER OF DISMISSAL & ABATEMENT & IN THE ALTERNATIVE PLTF'S RULE 52 MOTION FOR FINDINGS OF FACT & CONCLUSIONS OF LAW, filed. bj M/D 3-6-89 dkt'd 2-17-89
3-30-89	21	(LNH) ORDER, entered. Parties ntfd. Carvel Dillard's motions to amend this court's order of Feb. 2, 1989, and for findings of fact and conclusions of law are DENIED. kg

4-19-89	22	(LNH) ORDER OF DISMISSAL AND ABATEMENT, entered. Parties ntfd. These Defts are dismissed: Security Pacific Corp Security Pacific Brokers, Inc. Financial Clearing and Services Corp. Securities Industry Association The judgement above is final under Rule 54b. This case is abated for these defts: Jenkens & Gilchrist Merrill Lynch, Pierce, Fenner & Smith Inc.
4-19-89		Rec'd letter from Atty Wendell A. Odom, Jr. in re: note being nor will be Mr. Dillard's atty. eod 4-20-89 by
4-27-89	23	(LNH) ORDER OF DISMISSAL AND ABATEMENT, entered. Parties ntfd. rt 1. These Defts are dismissed: Security Pacific Corp Merrill Lynch, Pierce, Fenner & Smith Security Pacific Brokers, Inc. Financial Clearing and Services Corp. Securities Industry Association 2. The judgement above is final under Rule 54b. This case is abated for these defts: Jenkens & Gilchrist
5-3-89	24	PLTF'S RULE 52 MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE COURTS SECOND ORDER OF DISMISSAL AND ABATEMENT OR IN THE ALTERNATIVE THIS IS A

		MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE COURT'S THIRD ORDER OF DISMISSAL AND ABATEMENT OR IN THE ALTERNATIVE THIS MOTION IS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE MOST RECENT OF THE PREVAILING ORDER OF DISMISSAL AND ABATEMENT, filed. jlp eod 5-10-89 M/D 5-29-89 by clerk
5-3-89	25	AFFIDAVIT OF CARVEL DILLARD, filed. jlp eod 5-10-89
5-24-89	26	(LNH) ORDER, entered. Parties ntfd. Carvel Dillard's motion for findings of fact and conclusions of law on the court's order of April 27, 1989 (item 24) is DENIED. kg
6-1-89	27	DEFENDANT SECURITY PACIFIC CORPORATION'S RESPONSE TO PLAINTIFF'S RULE 52 MOTION AND MOTION TO STRIKE AFFIDAVIT, filed. eod 6-2-89 cj
5-30-89	28	Pltf's NOTICE OF CONSOLIDATED APPEAL from Order of Dismissal on April 27, 1989, and Order entered on Mar 30, 1989, filed. bw dkt'd 6-1-89
5-30-89		Filing & Docketing Fees BOTH Paid. (Rec't #327485) bw
6-15-89	29	Pltf's DESIGNATION OF RECORD OF CONSOLIDATED APPEAL, filed. bw (Entire File)

6-15-89	30	Court Reporter's TRANSCRIPT ORDER FORM advising that the estimated completion date for filing the transcript is: Aug 12, 1989, filed. bw (Herman Chester)
6-22-89	31	Copy of LETTER from Court of Appeals to Court Reporter, advising that the transcript due date is: Aug 11, 1989, filed. bw (Herman Chester)
8-3-89	32	Transcript of January 30, 1989 by Herman Chester, filed. (rec'd in appeals section 8-16-89, paid 8-15-89) dkt'd 8-17-89 jd
8-17-89		Record on Appeal, consisting of three volumes of record and one volume of transcript, forwarded to the Court of Appeals. dkt'd 8-17-89 jd
1/31/90	33	Certified Copy of ORDER by Court of Appeals REMANDING for limited purposes of the district court stating the reasons and authority for entry of its three orders on Feb 2, 1989, April 19, 1989 and April 27, 1989, after which the matter will be resubmitted to this court for consideration, filed. bw dkt'd 2/1/90
1/31/90	34	Letter from Court of Appeals to Judge Hughes advising that the record is being returned for his use, and is to be ret'd w/supplemental when completed, filed. bw (file fwd to crd) dkt'd 2/1/90
1/31/90		CASE REOPENED bw

5-24-90	35	Certified copy of PER CURIAM by CCA ORDERING CCA order of limited remand is VACATED, and it is further ORDERED district court's judgments entered on 2-2-89, 4-19-89 and 4-27-89 are VACATED and the matter is REMANDED to the district court for entry of judgment, filed. eod 5-25-90 km
7/17/90	36	(LNH) Order entered, parties ntfd. vp These defendants are dismissed: A. Security Pacific Corp.; B. Security Pacific Brokers, Inc.: C. Financial Clearing & Svcs Corp.; and D. Securities Industry Assoc., Inc. The judgment is final under Rule 54(b). The case is abated for these defendants: A. Jenkens & Gilchrist and B. Merrill Lynch, Pierce, Fenner, and Smith, Inc., eod 7/17/90
7-17-90	37	(LNH) ORDER entered, parties ntfd. vp OPINION ON DISMISSAL AND ABATEMENT - see order for details.
8-13-90	38	Pltf's NOTICE OF CONSOLIDATED APPEAL from the Order entered on 7-17-90, filed. (fees not paid)
8-13-90	39	Pltf's MOTION TO EXTEND TIME FOR FILING OPPOSITION TO MOTION TO DISMISS, MOTION TO CONSOLIDATE H-88-2848 & H-86-3251 MOTION FOR STAY, filed. km

8-20-90		Mailed notice of filing appeal to all parties and CCA. km
8/24/90		Filing and docketing fees paid, $105.00, #354299 parties notified
10/5/90	40	Pltf's DESIGNATION OF RECORD OF APPEAL, filed. bw eod 10/1/90
10/11/90	41	(LNH) ORDER, entered. parties ntfd. bw Dillard's motion to consolidate CA-H-86-3251 and CA-H-88-2848 is not before me. The motion to consolidate pends in CA-H-86-3251 and will be ruled on by Judge Lake.
10-26-90		RECORD ON APPEAL RETURNED to the CCA for CCA 89-2583 and appeal filed 8-13-90 consisting of all original instruments. (3 volumes of record and 1 volume of transcript) km

Date of Entry: August 18, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD, Plaintiff	
V.	CIVIL ACTION (BY JURY) H-88-2848
SECURITY PACIFIC CORP.; MERRILL LYNCH, PIERCE, FENNER & SMITH INC.; SECURITIES INDUSTRY ASSOCIATION, INC.; SECURITY PACIFIC BROKERS, INC.; FINANCIAL CLEARING AND SERVICES CORPORATION; JENKENS & GILCHRIST (A PARTNERSHIP); AND JENKENS & GILCHRIST (A PROFESSIONAL CORPORATION), Defendants	

COMPLAINT

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS:

Plaintiff, CARVEL G. DILLARD files this complaint against: SECURITY PACIFIC CORP.; MERRILL LYNCH, PIERCE, FENNER & SMITH INC.; SECURITIES INDUSTRY

ASSOCIATION, INC.; SECURITY PACIFIC BROKERS, INC.; FINANCIAL CLEARING AND SERVICES CORPORATION; JENKENS & GILCHRIST (A PARTNERSHIP); and JENKENS & GILCHRIST (A PROFESSIONAL CORPORATION), Defendants herein and asks for trial by jury. The Defendants have been served by U.S. Certified Mail, Return Receipt Requested, to their registered agent or through the good offices of the Secretary of State of Texas, each with copy of this Complaint and a summons that they be ordered to answer. Plaintiff prays that the Defendants be ordered to appear so that related claims can be adjudicated in a single jury trial. Plaintiff brings this civil action against the above named Defendants and demands permanent injunctive relief and damages by reason of Defendants' violation of: United States Federal Law, Texas State Law, Common Law and Law of Equity and would show the Court as follows:

Jurisdiction and Venue

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. #1332(A)(1) because it is a civil action between citizens of different states where the amount in controversy exceeds the sum of $10,000.00 exclusive of interests and costs and allegations of the violation of certain specific federal laws additionally confers subject matter jurisdiction.

2. Venue is proper in this district pursuant to 28 U.S.C. #1391(A) because the claims arose here.

II.

Description of the Parties

3. Plaintiff CARVEL G. DILLARD, herein ("MR. DILLARD"), a resident of Oregon, is a small investor and speculator and was a consumer of services provided by certain of the Defendants in Houston, Harris County, Texas.

4. Defendant, SECURITY PACIFIC CORP., herein ("S. PACIFIC"), is a corporation

organized under the laws of a state other than Texas which does business in Houston, Harris County, Texas, as well as other locations through its subsidiaries. SECURITY PACIFIC CORP.'S principal place of business is California. SECURITY PACIFIC CORP. is California's second largest bank holding company and it is engaged in the business of providing, among other things, banking, brokerage and financial services. SECURITY PACIFIC BROKERS, INC. is a subsidiary of SECURITY PACIFIC CORP. FINANCIAL CLEARING AND SERVICES CORPORATION is a subsidiary of SECURITY PACIFIC CORP. (both subsidiaries are organized under the laws of the State of Delaware), SECURITY PACIFIC CORP., SECURITY PACIFIC BROKERS, INC., and FINANCIAL CLEARING AND SERVICES CORPORATION are herein referred to as ("S. PACIFIC").

5. Defendant MERRILL LYNCH, PIERCE, FENNER AND SMITH, INC., herein ("M. LYNCH"), is a corporation organized under the laws of Delaware but it does business providing

brokerage and financial services in Houston, Harris County, Texas, as well as other locations.

6. Defendant SECURITIES INDUSTRY ASSOCIATION, INC. herein ("S.I.A.") is a corporation organized under the laws of a state other than Texas. It is the principal trade association of the securities industry. It has as members more than five hundred securities firms in the United States and Canada. A number of S.I.A.'s members provide brokerage services in Houston, Harris County, Texas and S.I.A. does business in Texas by providing membership services mostly by wire and U.S. Mail.

7. JENKENS & GILCHRIST is a Texas corporation and is both listed as a Defendant as a partnership and as a professional corporation because it is culpable for damages done while a partnership and for subsequent damages after time of incorporation. JENKENS &

GILCHRIST is a law firm and is herein complained of for knowingly participating in criminal conspiracy and knowing and deliberate commission of several felony crimes in conjunction with their representation of S. PACIFIC.

8. The illegal acts of the Defendant corporations were authorized, ordered, and accomplished by corporate officers, agents, employees or representatives while they were actively engaged in management, control, or direction of business activity.

9. Service of process in this litigation can be accomplished as follows:

CARVEL G. DILLARD, Plaintiff, Pro Se, through his attorney:

Wendell A. Odom, Jr.
SCHAEFFER, LAMBRIGHT & ODOM
3401 Louisiana, Suite 270
Houston, Texas 77002
(713) 529-1555

SECURITY PACIFIC CORP., Defendant, through the Secretary of State of Texas:

SECRETARY OF STATE
P. O. Box 12887, Capitol Station
Austin, Texas 78711-2887

TO:

Richard J. Flamson, III
Chief Executive Officer
SECURITY PACIFIC CORP.
333 South Hope Street
Los Angeles, California 90071

SECURITIES INDUSTRY ASSOCIATION, INC., Defendant, through the Secretary of State of Texas:

SECRETARY OF STATE
P. O. Box 12887, Capitol Station
Austin, Texas 78711-2887

TO:

Edward I. O'Brien
President
SECURITIES INDUSTRY ASSOCIATION, INC.
120 Broadway, 35th Floor
New York, New York 10271

MERRILL LYNCH, PIERCE, FENNER & SMITH INC., Defendant, through its registered agent:

C. T. CORPORATION
1601 Elm Street
Dallas, Texas 75201

SECURITY PACIFIC BROKERS, INC., Defendant, through its registered agent:

C. T. CORPORATION
1601 Elm Street
Dallas, Texas 75201

FINANCIAL CLEARING AND SERVICES CORPORATION, Defendant, through its registered agent:

C. T. CORPORATION
1601 Elm Street
Dallas, Texas 75201

JENKENS AND GILCHRIST (Corporation), Defendant, through its registered agent:

THOMAS H. CANTRILL
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202-2711

JENKENS AND GILCHRIST (Partnership), Defendant, through its managing partner:

THOMAS H. CANTRILL
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202-2711

III.

Co-Conspirators

10. Various other persons, firms and corporations not made Defendants herein have participated as co-conspirators with the Defendants in the offenses hereinafter charged and have performed acts and made statements in furtherance thereof. Said co-conspirators include, but are not limited to most of the individual members of S.I.A.

IV.

Trade and Commerce Involved

11. During the time period involved herein certain of the Defendant corporations sold for fees and commissions millions of dollars worth of stocks, bonds, options, and financial services out of and for the margin accounts of Plaintiff, MR. DILLARD, in Houston, Texas. The conspiracies and other crimes alleged herein had a substantial effect on said commerce. And the monopoly complained of has a substantial detrimental effect on the majority of all commerce in the United States occurring in stocks, bonds, and stock options.

Anti-Trust Offenses Charged

12. For many years past and continuing up to and including the date of the filing of this Complaint, the Defendants and co-conspirators have been engaged in an unlawful combination and conspiracy to restrain and in an unlawful combination and

conspiracy to monopolize, and the Defendants have attempted to monopolize and have monopolized, the interstate trade and commerce in stocks, bonds and stock options in violation of Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. Section 4) as amended entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Act, and Plaintiff claims private right of anti-trust action under the provisions of the Clayton Act (15 U.S.C.S.).

13. Defendants have unreasonably and illegally restrained the trade of Plaintiff and others by adopting and agreeing to use and in using exclusively uniform margin account contract provision mandating determination by arbitration of all claims and controversies arising under said contracts. There is an illegal group boycott by the members of S.I.A. by refusal to deal in order to force all margin customers into unjust arbitration

agreement. Margin accounts are in fact unavailable except by renouncing the rule of law and the courts in favor of arbitration.

14. There has been injury to MR. DILLARD'S business and to his property because of duress of threat to restrain trade of Plaintiff lest he sacrifice right of recovery by judicial determination of money stolen from Plaintiff by Defendants, and the restraint of the trade of MR. DILLARD was total. MR. DILLARD was in fact imprisoned for ulterior purpose in attempt to achieve collateral and unlawful objectives of the Defendants.

15. The direct result of Defendants' Sherman Act violations is to deprive Defendant of substantial monies currently due from Defendant to Plaintiff.

16. The certain result of Defendants' wrongful behavior is to line their own pockets with Plaintiff's money, which money, if not for the anti-trust law

violation, would be judicially commanded be paid to Plaintiff. The anti-trust violation was done willfully and deliberately by Defendants in order to prevent just recovery under the law of amounts they might steal.

17. Under Section 1 of the Sherman Act combination and conspiracy with competitors in unreasonable restraint of trade is charged against Defendants.

18. Under Section 2 of the Sherman Act monopolization of the securities brokerage business and conspiracy to monopolize is charged against Defendants.

19. Plaintiff additionally charges conspiracy by Defendants and their competitors in violation of the Sherman Anti-Trust Act by the Defendants in adopting and agreeing to use, and in using exclusively certain uniform contracts for securities trading containing provisions for the determination by arbitration of all claims and controversies arising under said contracts.

20. A plurality, indeed almost every brokerage company has taken concerted action by consensus or agreement to act together with it's competitors to unreasonably restrain the trade of any who do not renounce their rights under the law and agree instead to arbitrate in an unfair forum set up by Defendants and their co-conspirators which is rife with conflict of interest. The disputed trades took place in margin accounts and therefore proof of monopolization can be made by the total lack of opportunity to do anything but arbitrate disputes arising in each and every other of Defendant's competitor's customer's margin accounts. To the best of Plaintiff's knowledge and belief monopolization in the aforementioned regard is 100%; all evidence to the contrary is statistically insignificant and by design of the Defendants and their co-conspirators generally unknown and unavailable to the consumer.

21. Plaintiff will show that the similarity of behavior can, under the facts, only be attributed to an understanding among securities industry competitors to effect the restraint; their motivation being to restrict available services to Plaintiff so that he and others had no alternative but to sign unfair contract.

22. Defendants and their co-conspirators, in order to effect monopolization, acted with the intention that services be unavailable except on similar unfair terms and legal seminars, and legal bulletins of the conspirators' trade association, S.I.A., and other exchanges of information on model arbitration clauses and their intent to use them caused each individual company to know that others would act in conjunction with it to restrain the trade of those who refused to arbitrate. The brokerage companies contemplated the illegal action in illegal conspiracy through exchange of information and then executed the monopolization plan with full

knowledge of its probable anti-competitive effect.

23. The rule of reason dictates that we have here an unreasonable restraint of trade which by denial of necessary services by almost all of the providers of that service acts to deprive consumers of their property without recourse to the protection of law in violation of the Fourteenth Amendment to the United States Constitution. Indeed the arbitration clause acts as a fraudulent device by which the brokerage companies can steal and then hide their illegality in an unfair arbitration proceeding to which there is no appeal and no usable record for subsequent criminal prosecution.

24. The number of securities brokerage companies using the same arbitration clause in their margin agreements is so excessive that it does in fact constitute a group boycott by concerted refusal to deal in order to coerce their customers into an

unjust arbitration agreement which is illegal per se. The Defendants' participation in group boycott is illegal per se and Plaintiff does specifically declare that the arbitration agreement in this case is void because of group boycott.

25. The adhesion arbitration agreements are invalid and unenforceable due to violations of law and equity which are grounds for the revocation of any contract.

26. The securities industry is acting in concert in violation of the Sherman Act; their securities brokerage monopoly acts to restrain the trade of any who refuse to arbitrate. No one can trade in securities on margin without renouncing their freedom of contract and renouncing the protection of law for their property.

27. The contracts in question are adhesion contracts: it is a standard form offered to Plaintiff on a "Take it or leave it" basis without affording realistic opportunity to bargain and under such conditions that Plaintiff could not obtain the desired

services except by signing the form contract. Plaintiff had no choice as to its terms. Assent was not voluntary, it was coerced by the advantage of Defendants which was unlawfully exercised. Unlawful advantage of Defendants consisted of threat to prohibit trade of Plaintiff in securities. The threat constituted duress which induced Plaintiff to sign the contracts contrary to Plaintiff's will and to Plaintiff's detriment. Defendants' threat of restraint of Plaintiff's trade overcame Plaintiff's will and liberty of discretion to such an extent as to influence Plaintiff to act in a way that Plaintiff's judgement and discretion would condemn and prompt him not to do, if free from such influence.

28. Defendants' exploitation of unfair advantage in exempting itself from much of the consequences of its own negligence and illegal acts amounts to unfair protection of the interests of the Defendants in so

large a manner as to interfere with the public interest. If Plaintiff had been afforded the option to choose protection under the law or arbitration then the arbitration provision would be enforceable. But compelling a consumer to renounce his protection under the law upon pain of denial of services is contrary to public policy. If the desired services could be obtained from another brokerage house the Defendants might argue that Plaintiff did not have to trade with it and therefore the duress was not so extreme as to force compliance. But brokerage house services currently are, and at the time of contract were, unavailable to any consumer unless that consumer signs a virtually identical compulsory arbitration provision.

29. There is a conspiracy of brokerage houses to deprive buyers and sellers of securities of rights to due process and protection of law in securities transactions by restraint of trade and commerce in purchase and sale of

securities. Every major brokerage house has conformed to a uniform pattern of conduct in compelling the execution of a contract containing a compulsory arbitration provision. Plaintiff was unable to find any brokerage house large or small that does not impose upon its customers a contract stipulating compulsory arbitration as a precondition to business. Therefore choice even at another brokerage house was impossible.

30. Agreement, combination or conspiracy may be demonstrated in part from course of dealings warranting conclusion that conspirators had common design, meeting of minds or acted in concert and uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is restraint of interstate commerce is indicative of unlawful conspiracy under the Sherman Act.

31. The United States brought suit in the

District Court of the United Stated for the Southern District of New York, attacking an adhesion arbitration clause. In an able opinion, Judge Thacher of that court held the arbitration clause of the contract to be unlawful as being in violation of the Sherman Anti-Trust Act, United States v. Paramount Famous Lasky Corporation, 34 F.(2d) 984, and entered a decree enjoining the Paramount Famous Lasky Corporation, from acting under the arbitration clause in the contract. The opinion and decree of the District Court was affirmed by the Supreme Court of the United States (Paramount Famous Lasky Corporation v. U.S., 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed.

32. District Judge Thacher adjudged that: "Trade or commercial groups or traders generally may voluntarily impose on themselves standard forms of agreement which do not unduly restrict competition and thus restrain trade, and may agree that all controversies should be settled by arbitration so long as such agreements are

not sought to be imposed on others, regardless of their wishes, by coercive combinations having power to enforce their will.

The conspiracy charged in this case is predicated upon acts of the Defendants in adopting and agreeing to use, and in using exclusively, certain uniform contracts for the lease of motion picture films to theater owners throughout the United States, containing provisions for the determination by arbitration of all claims and controversies arising under said contracts.

...It had been the consistent policy of the distributors to refuse to deal with exhibitors who failed to arbitrate.... The coercive effect of this situation has undoubtedly been that, unless exhibitors submitted to arbitration...they have been unable to enter into new contracts.

...One can hardly imagine a more direct restraint upon trade than an agreement

between competitors in an open market not to trade except upon terms which they have fixed in advance.

...In judging the inherent character of the restraint one must look not only to the restraint voluntarily imposed upon the competitive activities of those who are in the combination, but also to the involuntary restraint imposed upon the freedom of outsiders to engage in trade under natural and normal conditions. It is therefore not enough to say that competition between distributors is keen and active, or even that it has been promoted and enhanced by what has been done, if, in fact, it can be seen that the freedom of others to engage in trade, to enter into normal commercial agreements, and to have recourse to the courts for their rights has been unduly restrained by the coercive and collective action of the Defendants. That competition between the distributors has been promoted by the adoption of the standard exhibition

contract, and that in many ways general trade conditions have been vastly improved, I have no doubt and so find. But the record is equally clear that all this good has been accomplished through the exercise of irresistible economic force consolidated by combination in the hands of the distributors, who collectively control the available supply of films and by virtue of this control have imposed their will upon the industry. By agreement of these distributors exhibitors who were not represented in the adoption of the uniform contracts have been constrained to accept their terms regardless of their wishes, and by the compulsory system of arbitration, sanctioned and enforced by the collective action of the distributors, have been constrained to perform the contractual obligations thus assumed. In fairness it cannot be said that the restraint imposed upon these exhibitors is voluntary because they accept and agree to be bound by the

contracts. They can have none other, because the Defendants have agreed that they shall not; and, unless something more than the mere acceptance of all they can get is shown, they must be said to have acted under an involuntary restraint, imposed and continued by the Defendants to the end that the contracts shall be signed and their terms obeyed. That such coercive restraint upon the commercial freedom of an exhibitor, who was neither represented nor consulted with reference to the agreement to adopt the standard form of contract, is undue and unreasonable, both at common law and under the Sherman Act, I cannot doubt. Gains resulting from such restraints to the industry as a whole do not in the eyes of the statute justify the vicarious sacrifice of the individual, even for the sake of bigger and better business. A State Legislature could not lawfully impose compulsory arbitration upon the motion picture industry. Wolff Packing Co. v. Court of Industrial Relations of State of

Kansas, 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 ALR 1280. Much less should it be within the power of a combination of practically all the distributors to do so by coercion exercised through control of the available supply of films.

...The restraint, if not shown to have been voluntary on both sides, is oppressive, and therefore undue and unreasonable.

...Nothing that has been said should be taken in derogation of the right of trade or commercial groups, or of traders generally, to voluntarily impose upon themselves standard forms of agreement which do not unduly restrict competition and thus restrain trade, or to agree that all controversies arising between them shall be settled by arbitration. Such agreements dealing only with the rights of those who execute and intend to be bound by them are normal and usual, and are proper instruments in the lawful conduct of trade. It is only when such agreements are sought

to be imposed upon others, regardless of their wishes, by coercive combinations having the power to say 'Take what is offered or get nothing', that they become illegal."

33. The instant case is indistinguishable from the Paramount case in all essential elements concerning the arbitration clause.

34. Defendants' alleged right to force arbitration on all its customers whether they like it or not is in conflict with the Fourteenth Amendment to the United States Constitution, and deprives Plaintiff of his property and liberty of contract without due process of law.

35. Duress in inducement of arbitration agreement is proper ground for revocation under 9 USCS Sec. 2. See Hellenic Lines LTD v. Louis Dreyfus Corp. (1967, CA 2 NY 372 F2d 753).

36. The coercion and duress in the instant case consisted of illegal restraint of trade in violation of the Sherman Act. A Sherman Act violation in the signing of the

arbitration agreement voids that agreement. It is fact that the Defendants participate in a coercive combination with their brokerage industry competitors in obvious violation of Federal Anti-Trust Law.

37. By design no consumer shall anywhere trade securities unless he first renounce protection of law and accept arbitration. The consumer is by duress deprived of the right of voluntary contract making the compulsory arbitration provision no contract. It is more simply a unilateral declaration by the brokerage houses in concert; not a mutually agreed contract and as such it is null and void and has no force of law. Plaintiff's allegation of Federal Law violation is directed to the arbitration clause itself--not the contract generally. Please see: Prima Paint Corp. v. Flood and Conklin Mfg. Co. 388 U.S. 395, 406 (1967): "Accordingly, if the claim is an illegal act in the inducement of the arbitration clause itself--an issue which

goes to the 'making' of the agreement to arbitrate--the Federal Court may proceed to adjudicate. This position is consistent both with the decision in Moseley v. Electronic Facilities, 374 U.S. 167, 171, 172 (1963) and with the statutory scheme. As the 'saving clause' in Sec. 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge...would be to elevate it over other forms of contract--a situation inconsistent with the 'saving clause"', see 388 U.S. 403-404.

38. Federal policy suggesting that arbitration be encouraged did not give license for coercive combinations which operate in restraint of trade; nor does such a policy allow violation of Federal Anti-Trust Law in order to promote arbitration. Nor does it allow duress to be used in the making of an arbitration contract.

39. It has been established that claims under the Sherman Anti-Trust Act are inappropriate for arbitration. Please see American Safety Equipment Corp. v. J. P. Maguire & Co. (1968, CA2 NY) 391 F2d 821, 3 ALR FED 901.

40. In Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985), the Supreme Court pointed out by way of footnote that the decision expressed no view on the validity of arbitration provisions contained in adhesion contracts and that the issue was not addressed because it was not first raised in the lower courts and they thought it improper to address it in the first instance. However, the supreme Court has previously ruled that an arbitration provision contained in a contract of adhesion is null and void if it is imposed by a participant in powerful coercive combination which acts to restrain trade of those who fail to agree to arbitrate. Until and unless the Supreme Court reverses

itself on that decision it is the law. This case is in every particular exactly the same as the Paramount case as regards the agreement to arbitrate and therefore it must be treated under the law in the same manner. In order to validate their adhesion arbitration clause, Defendants must show that this case and the Paramount case are different. But they cannot, for they are the same as regards the adhesion arbitration clause.

41. Today a film exhibitor can contract for film rental without executing an arbitration agreement. An investor should also be able to deal with a brokerage house under the protection of law. The standard that this Court should impose is that arbitration provisions of brokerage contracts may not be enforced against the party which had no choice because of restraint of trade. Rejection or acceptance of compulsory arbitration by free choice could be shown upon the contract by the initialing of appropriate box. Similarly,

contracts for loans often used to include adhesion provision that insurance, often at high cost, be purchased by the borrower. Lending institutions must now allow the consumer to accept or reject this coverage, which is accomplished by the consumer initialing his choice in an appropriate box upon the contract. The court should require that if Defendant wants mandatory arbitration it must draft its contracts in such a way that the arbitration provision is not adhesion but rather is shown to be the free choice of the consumer. Once agreement to arbitrate is made, without duress, then and only then is the contract binding with the force of law and the courts to compel arbitration as per the Byrd decision.

42. The Supreme Court had to assume that no duress or compulsion by monopoly was involved in the making of the agreement to arbitrate in the Byrd case because that is the way the case came to them. However,

unlike the Byrd case, in the instant case there is allegation that the agreements to arbitrate are not valid or enforceable because of violations of law in the making of the agreement to arbitrate.

43. If the securities brokerage industry is allowed to place itself above the law by legislating by contract could not then any monopoly exempt itself from the rule of law by embracing an arbitration panel? Such a policy would be against the public interest. And therefore the arbitration contract in question in this case is void because it is against strong protective public policy concerns. There being no private consent to support a contract of adhesion, its legitimacy rests entirely on its compliance with standards in the public interest.

44. Defendants' adhesion arbitration clause must be declared void as a result of its imposition by monopoly in violation of Federal Law as per the Supreme Court's Paramount decision. Defendants should send

a contract addendum to their current customers allowing them to choose either arbitration or the courts in the event of future controversy. Legally, the customer must be able to choose either, at the customer's sole option, because voiding of the contract provision for compulsory arbitration due to compulsion by monopoly is not available to Defendants, although by the law of the Paramount case it currently is to Defendants' customers which includes Plaintiff in this case.

45. The Commodity Futures Trading Commission in 17 C.F.R. Section 180.3 voided arbitration agreements which, inter alia, are not voluntary. The record of Ames v. Merrill Lynch, Pierce, Fenner & Smith Inc. 567 F2d 1174 (1977) shows why: Because the brokerage houses admitted that if a trader did not sign a compulsory arbitration agreement he was not able to trade effectively and was thus squeezed out of the commodities market. Today we have

the exact same situation regarding trading securities in margin accounts: It is impossible to trade effectively in securities without a margin account and an investor cannot get one anywhere unless he signs a compulsory arbitration agreement.

46. The Court should recognize the gross violation of law exhibited by the securities industry when they legislate by adhesion contract and the Court should prohibit enforcement of compulsory arbitration by adhesion contract.

47. Things will become fair and equitable in securities trading only if a man chooses to arbitrate and signs a contract to that effect because he perceives it to be to his own advantage, which free choice and perceived advantage are the essence of a contract and an unfair adhesion demand upon pain of loss of necessary services is no contract and is contrary to the principles upon which this great nation was founded. And should the Court allow it in this instance what then prevents other coercive

combinations from setting up their own arbitration panels and by irresistible economic force and adhesion contract then exempting themselves from the rule of law?

VI.

Other Violations

48. MR. DILLARD had a margin account at M. LYNCH. ~~Pur~~suant to one scheme and continuing course of conduct M. LYNCH did steal money owned by MR. DILLARD out of his margin account in the aggregate value of over $250,000.00.

49. The scheme was a systematic looting of MR. DILLARD'S M. LYNCH margin account. Close to one million dollars was embezzled out of the account but clear theft is only proveable for $256,500.00 of the loss. Pursuant to the same scheme and continuing course of conduct S. PACIFIC did embezzle about $50,000 out of another of MR. DILLARD'S margin accounts and then S. PACIFIC attempted theft by extortion of $30,405.00. S. PACIFIC demanded, upon

threat of criminal prosecution, that the $50,000.00 that they embezzled by improperly debiting MR. DILLARD'S account be paid to them and additionally S. PACIFIC demanded, upon threat of criminal prosecution, payment of an additional $30,405.00 which they had no right or claim to--for a total demand of $86,661.00. When S. PACIFIC was unable to maintain criminal prosecution for theft of the $86,661.00, they then made a malicious, vague, and frivolous criminal complaint of theft of an unspecified exact amount. When the 184th District Court of Texas quashed that indictment, S. PACIFIC continued the malicious prosecution by making a malicious, vague and frivolous criminal complaint of theft of $8,000.00. Indictment for theft of the $8,000.00 was also dismissed upon MR. DILLARD'S motion.

50. This pattern of baseless repetitive claims is a badge of malicious prosecution. The Defendants undertook an illegal, improper and perverted use of criminal

process, a use neither warranted nor authorized by law and the ulterior motive or purpose was:

1) to hide M. LYNCH'S theft by attacking Plaintiff and impeding his ability to sue;

2) to protect adhesion arbitration by attacking Plaintiff and impeding his ability to sue;

3) for collection of an unlawful debt;

4) for extortion of money

5) for use as a club to force Plaintiff to abandon his civil litigation.

51. MR. DILLARD has endured several years of prosecution.

52. First criminal prosecution: Extortion threat by letter from District Attorney, herein ("D.A.") on August 28, 1984, indicating that S. PACIFIC had complained of theft of $86,661.25, proceeds which were supposed to be delivered by M. LYNCH, and that MR. DILLARD must pay $86,661.25 to S. PACIFIC plus a $225.00 fee within 10 days or MR. DILLARD would be jailed without additional notice.

53. Second criminal prosecution: Styled Texas v. Dillard #431068, for theft of unspecified amount of money from S. PACIFIC, indicted August 19, 1985, quashed September 16, 1987.

54. Third criminal prosecution: Styled Texas v. Dillard #484550, for theft of $8,000.00 from S. PACIFIC, indicted September 17, 1987, dismissed June 21, 1988.

55. The multiple criminal prosecutions were both an abuse of process and malicious.

56. This Court should issue order restraining Defendants from further harassment of Plaintiff and his family by repeated, no probable cause, indictment on the complaints of S. PACIFIC, under the supervision of JENKENS & GILCHRIST, and all due to the perfidy and collusion of M. LYNCH.

57. Malicious prosecution and abuse of process is charged against Defendants M. LYNCH, S. PACIFIC and JENKENS & GILCHRIST.

58. Malicious prosecution of MR. DILLARD

caused his father to be handcuffed and arrested and his brother was confronted with demand for identification from a pistol in hand officer upstairs inside his home.

59. M. LYNCH is directly connected to the malicious prosecution in part through the employee of S. PACIFIC who deliberately made an untrue affidavit, under JENKENS & GILCHRIST supervision, to elicit criminal prosecution of MR. DILLARD, in reward for which the same employee of M. LYNCH who looted MR. DILLARD'S account awarded him a job at M. LYNCH.

60. M. LYNCH falsely told the D.A. investigator that MR. DILLARD never had any money in his M. LYNCH account.

61. They are co-conspirators; and M. LYNCH, S. PACIFIC, and JENKENS & GILCHRIST are each guilty of the crimes of the other.

62. After refusing Defendants' extortion demand, MR. DILLARD was arrested and held five days in jail without bond at the time

when specific deadlines were pending in civil litigation.

63. The Defendants encouraged the D.A. to make a no bond request in a flagrant abuse of process in an attempt to prevent MR. DILLARD'S pleading in civil actions against them.

64. All criminal charges against MR. DILLARD have been quashed and dismissed.

65. But the prosecutions lasted for years, over the past year alone MR. DILLARD has been required to appear eighteen times in the 184th District Court.

66. The Defendants used the criminal prosecutions in an attempt to force MR. DILLARD to abandon his right of civil action against them.

67. Previously the conspirators had abused process by using the criminal prosecution in an attempt to extort money.

68. Aware that this Court was looking into the matter because of their receipt of the Court's order of June 21 in Civil Action H-86-3251, on June 28, 1988, S. PACIFIC sent

MR. DILLARD written offer to forgive the $56,256.00 default judgement and drop criminal charges for peace.

69. $256,500.00 of MR. DILLARD'S money was stolen;

70. MR. DILLARD'S family was arrested.

71. MR. DILLARD was arrested.

72. MR. DILLARD, a resident of Oregon, was forced to relocate to Texas in order to appear in criminal court every few weeks. There was cost of lawyers and bond. MR. DILLARD was forced to try to find employment in Houston. But the Defendants' defamation, slander, and libel injured and impeached the reputation of MR. DILLARD, and MR. DILLARD has had difficulty finding employment.

73. MR. DILLARD had been at the top of his profession of security services contractor before selling his company for millions of dollars.

74. Compelled to live in Houston while the long prosecutions continued, MR. DILLARD

found employment as General Manager of a security services contracting company at a salary of $65,000.00 a year plus a company car; and after two months on the job MR. DILLARD was given a Vice Presidency and promised $85,000.00 a year and stock options next year and asked to join the Board of Directors.

75. Upon disclosure of indictment, the company President gave MR. DILLARD a leave of absence to solve legal problems. After several months, MR. DILLARD'S position was filled by another man before the criminal charges were dismissed.

76. MR. DILLARD is well known in the security services industry and word of the criminal prosecution has gotten around. MR. DILLARD'S lifetime earnings potential is diminished and MR. DILLARD is affected injuriously in his occupation by the illegal actions of the Defendants.

77. The loss of time and costs, the embarrassment and humiliation, the mental vexation, and mental injury caused by the

three false criminal complaints, each made on the heels of the other, weigh heavily upon MR. DILLARD. MR. DILLARD asks for compensation for damage caused by Defendants' anti-trust conspiracy, thefts, extortion, abuse of process, malicious prosecution, libel and slander.

78. Subsequent to the theft from MR. DILLARD'S M. LYNCH account, he complained to M. LYNCH and from their response MR. DILLARD was led to believe that at least $256,500.00 would be returned into his M. LYNCH account. Instead, M. LYNCH reported to the United States Internal Revenue Service, herein ("I.R.S."), income to MR. DILLARD of over two and one-half million dollars for proceeds of sham Superior Oil ("S.O.C.") stock sale; a sham because M. LYNCH sold S.O.C. stock in behalf of MR. DILLARD prior to the carefully stipulated contractual delivery date to MR. DILLARD of that stock. M. LYNCH sold stock in MR. DILLARD'S behalf, which stock MR. DILLARD

had never received.

79. I.R.S. Revenue Officer Joy Jackson has stated that the trigger of an audit of three years of MR. DILLARD'S income was M. LYNCH'S report of this approximately two and one-half million dollars of revenue, which revenue MR. DILLARD had not reported to the I.R.S. The I.R.S. investigation concluded that MR. DILLARD owed no tax and motion for dismissal with prejudice has been agreed to by the U.S. Attorney. Action No. H-88-163 styled United States v. Dillard is currently before this Court on the U.S. Attorney's Motion to Dismiss.

80. When the lawsuit was initiated to collect the stolen monies M. LYNCH demanded arbitration and MR. DILLARD refused citing that under 9 U.S.C.A. Section 2, the Federal Arbitration Act, the arbitration clause in the margin contract is null and void because its execution was induced by illegal compulsion by monopoly. The lawsuit, #H-85-4135 was before Judge Singleton who did nothing and recused

himself and then before Judge Sterling, who died before issuing promised written orders and the case went to Magistrate Karen Brown, who did nothing and recused herself, and most recently it went to Magistrate George Kelt, who also has issued no order.

81. M. LYNCH conspired with S. PACIFIC and JENKENS & GILCHRIST to have S. PACIFIC criminally prosecute MR. DILLARD. The malicious prosecution was in part a retaliation for threatening the security industries' license to steal, their adhesion arbitration clause.

82. Brokerage companies uniformly demand arbitration when they are at risk but often contravene arbitration when it suits their interest. MR. DILLARD'S contract with S. PACIFIC, like the contract with M. LYNCH, mandates arbitration.

83. The State of Texas still holds MR. DILLARD'S $5,000.00 appearance bond money on the third criminal prosecution which should be ordered returned immediately.

84. M. LYNCH should be ordered to claim for themselves all the S.O.C. stock and option purchases allegedly done for MR. DILLARD'S account and to also claim the losses on the sale of the S.O.C. positions as well. Neither should be charged against the margin account of Plaintiff, yet they were. M. LYNCH should account to this Court for their S.O.C. stock and option positions as to number for 1983 and 1984, including disbursement and receipts of cash for same.

85. If the trade is not MR. DILLARD'S it has to belong to M. LYNCH, and MR. DILLARD will prove that the stock was sold before it was delivered and it was in fact never delivered. If it had been delivered it would have been used to fill third party contract. MR. DILLARD did not order it sold; he ordered it delivered. It was reported sold before delivery date of December 29, 1983. MR. DILLARD never got what he paid for. He never had the beneficial use of the stock. The December 29, 1983, date of delivery and payment was

ignored by M. LYNCH although they obtained formal permission from the Federal Reserve and from the exchange for an unusual payment on December 29, 1983 for the S.O.C. stock, which purchase date they required be guaranteed by purchase by MR. DILLARD of Guaranty insurance, consisting of purchase from or through M. LYNCH of $104,000.00 worth of puts, which had three months to run; all this was pursuant to a written third party contract which called for a December 29, 1983 delivery.

86. MR. DILLARD had for several years maintained a margin account with M. LYNCH for the purpose of trading in stocks, options, bonds and other securities at their offices at Greenway Plaza, Harris County, Texas (location at which untrue statement of material fact was made). Often MR. DILLARD maintained unusual financial arrangements with M. LYNCH by offering indemnification and it had been agreed that a trade was never to be done against the

wishes of MR. DILLARD if M. LYNCH could sustain no loss.

87. MR. DILLARD had, at an expense of over $150,000.00 for purchase of call options, acquired the right to purchase 52,000 shares of S.O.C. at $35.00 per share.

88. MR. DILLARD had requested that the terms of his payment for the S.O.C. shares be changed from payment due date of December 23, 1983, to payment due date of December 29, 1983 (the date theft was proven to MR. DILLARD).

89. On December 23, 1983 (date of untrue statement of material fact), MR. DILLARD was told by Steven A. McAnally, representing M. LYNCH, that payment on December 29, 1983, had been approved by the Self Regulatory Agency of the Exchange and by the Federal Securities and Exchange Commission and that M. LYNCH would also agree to December 29, 1983, payment date, but only if MR. DILLARD purchased Guaranty Insurance from M. LYNCH. Deals like this

had been done before by MR. DILLARD and M. LYNCH, much to M. LYNCH'S enrichment and much to MR. DILLARD'S loss, but M. LYNCH had always honored the carefully agreed details of the individual complex trade and there was a long-standing tradition of trust.

90. M. LYNCH told MR. DILLARD that insurance was necessary to eliminate the hazard of economic loss to M. LYNCH should the value of the stock decrease below what was owed and MR. DILLARD failed to pay on December 29 and if MR. DILLARD would agree to purchase from or through M. LYNCH about $104,000.00 worth of puts which gave the holder the right to sell 52,000 shares of S.O.C. at $35.00 per share; M. LYNCH could suffer no loss as a result of the granting of the extension of payment and would, therefore, certainly deliver to MR. DILLARD exactly 52,000 shares of S.O.C. on December 29, 1983 (untrue statement of material fact).

91. It was agreed by MR. DILLARD and M. LYNCH and M. LYNCH did purchase for the account of MR. DILLARD 520 S.O.C. March 17, 1984, expiration $35.00 puts as insurance to guarantee and warranty their mutual contract for payment for and delivery of the 52,000 S.O.C. shares.

92. M. LYNCH promised to hold both puts and stock in trust in MR. DILLARD'S account until December 29, 1983. On December 27, 1983, M. LYNCH told MR. DILLARD that it was taking some of the 52,000 shares of S.O.C. from MR. DILLARD'S account and was selling them for the purpose of settling an unrelated transaction.

93. The stock was never constructively received by MR. DILLARD. It was never under MR. DILLARD'S control and profitable disposition of the stock by MR. DILLARD was prevented by M. LYNCH, since MR. DILLARD'S third party contract absolutely required exactly 52,000 shares be in MR. DILLARD'S account on December 29, 1983.

94. MR. DILLARD pointed out to M. LYNCH

that equity in MR. DILLARD'S accounts was sufficient so that no liquidation was necessary to protect M. LYNCH from loss; and MR. DILLARD cited to M. LYNCH terms of contract and explained damages that would certainly result if all 52,000 shares of stock were not delivered to MR. DILLARD on December 29, 1983. MR. DILLARD'S objections were ignored and M. LYNCH sold some of the stock.

95. MR. DILLARD hand delivered a letter to M. LYNCH prior to the opening of the market on December 28 and watched Steven D. McAnally read the letter. The letter protested the wanton and capricious damage done by the partial sale of the previous day and the letter demanded that no additional S.O.C. shares be sold.

96. M. LYNCH continued to sell more of MR. DILLARD'S S.O.C. shares after the market opened on December 28, exhibiting scienter of reckless disregard and punitive conduct.

97. A total hedge was absolutely a no

forced sale situation; this principle was M. LYNCH'S and MR. DILLARD'S mutual agreement and contract.

98. M. LYNCH as fiduciary was bound not to wantonly harm the interest of MR. DILLARD.

99. But MR. DILLARD would still have some money in his M. LYNCH account even after the losses on the worthless put buy so the commission structure was changed to steal the remaining cash.

100. M. LYNCH'S actions prevented the on-time delivery and the beneficial use of the 52,000 shares of S.O.C. which had been guaranteed by M. LYNCH to MR. DILLARD. Loss to MR. DILLARD was caused by MR. DILLARD'S reliance on deception by M. LYNCH and MR. DILLARD'S reliance was justified due to previous history of thinly margined trades. MR. DILLARD had arranged by previous written contract with a third party the disposition of the S.O.C. stock. In order to execute the contract, it was imperative that all 52,000 shares be declared by MR. DILLARD to be on deposit in MR. DILLARD'S

margin account on December 29, 1983. MR. DILLARD was unable to make the required declaration and pledge of transfer as required by the terms of the third party contract because M. LYNCH did not deliver all the stock and 52,000 shares were not in the account on December 29.

101. Sale under the terms of the third party contract specified revenues to MR. DILLARD of at least $250,000.00 more than M. LYNCH credited to MR. DILLARD'S account as a result of M. LYNCH'S liquidations of the S.O.C. stock. In addition to the aforementioned $250,000.00 loss, MR. DILLARD lost in excess of another $250,000.00 in direct losses because of purchases of S.O.C. stock and S.O.C. stock options from or through M. LYNCH (losses total over $500,000.00). MR. DILLARD only claims $256,500.00 theft loss because although M. LYNCH stole both the $250,000.00 net loss on S.O.C. stock and options and the $250,000.00 value of the

stock delivery the two claims are equitably mutually exclusive; so MR. DILLARD only claims $256,500.00 rather than $500,000.00, although MR. DILLARD'S claim to either is valid.

102. M. LYNCH did illegally, unilaterally, award itself over $6,500.00 in extra commissions out of MR. DILLARD'S account. Under captive customer conditions M. LYNCH did grant itself commission increases out of MR. DILLARD'S funds, which had been entrusted to M. LYNCH'S care, in an eleventh hour looting of MR. DILLARD'S account before it passed from M. LYNCH'S control.

After receipt of copy of letter from MR. DILLARD to Steven D. McAnally dated December 28, 1983 (the second letter to M. LYNCH from MR. DILLARD of that date), Thomas W. Taylor, Vice President of M. LYNCH, did confer with MR. DILLARD on December 28 by telephone; Mr. Taylor did then apologize profusely for the commission increase because he had negotiated the

long-standing contract with MR. DILLARD and he had recently reconfirmed the commission structure when MR. DILLARD had told Mr. Taylor that MR. DILLARD was considering changing brokerage houses. Mr. Taylor then said to MR. DILLARD that he was helpless to prevent or rescind the increase in commissions; although he then confirmed the legal contract rate as well as the illegal overcharges and said that the overcharge was ordered by Mr. McAnally.

103. In order to facilitate the theft M. LYNCH did use instruments of transportation and communication in interstate commerce including the mails.

104. M. LYNCH did not have 52,000 shares of stock on delivery date, December 29, 1983 because they had sold some of the shares. Delivery as contracted for by MR. DILLARD was quite obviously impossible.

VII.

R. I. C. O.

105. Theft or fraud in sale of securities

qualifies as "racketeering activity within meaning of Racketeer Influenced and Corrupt Organizations Act" 18 U.S.C.A. Sec. 1961 (1) and Plaintiff charges Defendants herein with theft and fraud in sale of securities and other crimes under Federal R.I.C.O.

106. The pattern of several acts by M. LYNCH include but are not limited to:

1) the theft of thousands of dollars in commissions by fiat increase in rate of commissions on sham transactions in S.O.C. stock and options in MR. DILLARD'S margin account;

2) the non-delivery of the stock;

3) the sale of call stock options that were good in that they were used to buy the stock, worthless in that the stock bought was never delivered; so they were worthless;

4) the sale of put options that were totally worthless in that they did not guarantee as M. LYNCH promised that M. LYNCH would not sell the S.O.C. before December 29, 1983. They were a theft and fraud; a worthless transaction.

107. S. PACIFIC is guilty of extortion under color of official right in that they demanded $86,661.00 on false affidavit and used the color of official right, the power

of the State of Texas, to accomplish the extortion. MR. DILLARD was ordered to pay $30,405.00 that S. PACIFIC has no right or claim to whatsoever in addition to $56,256.00 claimed but not lawfully owed lest the full power of the State of Texas harass and oppress him, MR. DILLARD refused to pay this extortion demand; he was arrested.

108. MR. DILLARD charges violation of the Hobbs Act against Defendants.

109. S. PACIFIC is guilty of attempting theft by extortion threat of criminal prosecution, which is punishable as theft.

110. S. PACIFIC is guilty of extortion, U.S.C.A. 18 Section 151, Note 133.

111. S. PACIFIC is guilty of conspiracy to interfere with interstate commerce by extortion, U.S.C.A. Section 1951, Note 11.

112. The three false theft charges were done to harass and oppress and were carried on either to compel payment of, or in retaliation for refusal to meet Defendants' extortion demand.

113. JENKENS & GILCHRIST is liable for knowingly prosecuting three groundless actions to accomplish malicious purpose of its client.

114. Certain methods such as the aforementioned extortion threat, used by JENKENS & GILCHRIST and by S. PACIFIC under the direction of JENKENS & GILCHRIST to accomplish malicious purpose were criminal.

115. JENKENS & GILCHRIST, M. LYNCH, and S. PACIFIC met at various times and conferred by telephone and in writing concerning concerted action against MR. DILLARD.

VIII.

Damages

116. The unlawful acts and practices of Defendants described herein were unconscionable, manipulative, deceptive, fraudulent and criminal. Defendants' illegal actions were performed knowingly, adversely affected Plaintiff and were a producing cause of damages to Plaintiff. Plaintiff seeks to recover the amount of

money which, if paid in cash, would compensate Plaintiff for such damages. Plaintiff asks that the Court award him the cost of the thefts, plus pre-judgement and post-judgement interest as provided by law, plus reasonable attorney's fees pursuant to Article 2226 of the Texas Revised Civil Statutes, plus all costs including costs of court.

117. The thefts, multiple felonies, and reckless disregard for Plaintiff's rights committed by Defendants and their agents warrant the awarding of punitive and exemplary damages and the R.I.C.O. Statutes mandate trebled damages. The character of Defendants' acts, the nature and extent of the harm to Plaintiff, and the large wealth of Defendants require the awarding of substantial punitive and exemplary damages.

118. Plaintiff requests that the Court entitle him to obtain from Defendants no less than $256,500.00 cost of theft, plus at least $135,000.00 interest, plus

$27,000.00 costs, all trebled for a subtotal of $1,255,500.00 and added to the $1,255,500.00 Plaintiff prays that the Court shall award additional amounts of $7,000,000.00 for mental injury and $5,000,000.00 for harm to reputation and $4,000,000.00 for harm to profession, all trebled for a subtotal of $48,000,000.00. Plaintiff prays for a total judgement for Plaintiff and against Defendants of $49,255,500.00.

IX.

Prayer

WHEREFORE, THE PLAINTIFF PRAYS:

119. That the Court adjudge and decree that the Defendants have combined and conspired to restrain and monopolize, have attempted to monopolize, and have monopolized interstate commerce in the securities brokerage services industry, in violation of Sections 1 and 2 of the Sherman Act.

120. That each of the Defendants, their officers, directors, agents and employees, and all persons acting or claiming to act

on behalf of the Defendants or any of them, be perpetually enjoined from continuing to carry out, directly or indirectly, the aforesaid combinations and conspiracies to restrain and to monopolize, attempt to monopolize and monopolization of, the aforesaid interstate commerce in the securities brokerage services industry and that they be perpetually enjoined from engaging in or participating in practices, contracts, agreements, or understandings, or claiming any rights under provisions of adhesion arbitration clauses.

121. That the Court enter appropriate orders to assure that arbitration clauses in brokerage margin contracts must show that the consumer was offered arbitration as a binding if accepted but refusable option and that services cannot be denied if the consumer initials no compulsory arbitration and prefers that all transactions in his margin account meet the requirements and rule of law through the

Courts in the event of dispute.

122. That all Defendants be required to terminate all agreements between or among themselves and that they be enjoined from continuing to observe provisions contained in agreements previously existing between or among themselves; in order to restore competition in the securities brokerage services industry.

123. That the Defendants be assessed culpability as follows: M. LYNCH, S. PACIFIC, and JENKINS & GILCHRIST must jointly and severally pay judgement to MR. DILLARD because of common guilt by conspiracy.

124. That a class action is superior to other available methods for the fair and efficient adjudication of the controversy over the anti-trust violations. (Under Rule 23 of the Federal Rules, MR. DILLARD hereby moves that this Court declare a class to be composed of all the customers of S.I.A. member companies in the United States who have margin accounts with adhesion

arbitration clauses; in the alternative, the class can be composed of only those customers in the Southern District of Texas, at the Court's discretion. In fact the monopoly complained of is pervasive throughout all regions of the United States.)

125. That pleading damages for the class may be reserved until trial.

126. That S.I.A. must distribute to each of its members within the designated class area copy of court order informing them that they must notify securities brokerage margin customers that the customer may elect for arbitration or judicial determination of disputes at the customers' sole discretion via the court ordered mailout contract addendum.

127. That S.I.A. would be found guilty only of anti-trust law violations.

128. That Defendants be cited to answer and appear herein and that the Honorable Judge and jury of this Court declare that

Defendants, S. PACIFIC, M. LYNCH, and JENKENS & GILCHRIST must jointly and severally pay to Plaintiff MR. DILLARD, judgement of $49,255,500.00. And Plaintiff prays for all other and further relief general or special, at law or in equity, to which Plaintiff may be justly entitled, and for all other and further proper relief.

Respectfully submitted,

CARVEL G. DILLARD,
Plaintiff

Process can be served and communication made with Plaintiff, CARVEL G. DILLARD, Plaintiff, Pro Se, through attorney:

Wendell A. Odom, Jr.
SCHAEFFER, LAMBRIGHT & ODOM
3401 Louisiana, Suite 270
Houston, Texas 77002
(713) 529-1555

Date of Entry: February 2, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD,	$	
Plaintiff,	$	
	$	
vs.	$	CIVIL ACTION
	$	NO. H-88-2848
SECURITY PACIFIC	$	
CORP., et al.,	$	
	$	
Defendants.	$	

ORDER OF DISMISSAL AND ABATEMENT

A. These defendants are dismissed:

Security Pacific Corporation

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Security Pacific Brokers, Inc.

Financial Clearing and Services Corporation.

B. The judgment in A is final under Rule 54(b).

C. The case is abated for these defendants:

Securities Industry Association, Inc.

Jenkens & Gilchrist.

Signed on January 31, 1989, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Date of Entry: March 30, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
vs.	$	CIVIL ACTION
	$	NO. H-88-2848
SECURITY PACIFIC	$	
CORP., et al.,	$	
	$	
Defendants.	$	

ORDER

Carvel Dillard's motions to amend this court's order of February 2, 1989, and for findings of fact and conclusions of law are denied.

Signed on March 27, 1989, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Date of Entry: April 19, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
vs.	$	CIVIL ACTION
	$	NO. H-88-2848
SECURITY PACIFIC	$	
CORP., et al.,	$	
	$	
Defendants.	$	

ORDER OF DISMISSAL AND ABATEMENT

A. These defendants are dismissed:

Security Pacific Corporation

Security Pacific Brokers, Inc.

Financial Clearing and Services Corp.

Securities Industry Association, Inc.

B. The judgment in A is final under Rule 54(b).

C. The case is abated for these defendants:

Jenkens & Gilchrist

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Signed on April 10, 1989, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Date of Entry: April 27, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD,	$	
	$	
Plaintiff	$	
	$	
VS	$	C.A. No. H-88-2848
	$	
SECURITY PACIFIC	$	
CORP., et al,	$	
	$	
Defendants	$	

ORDER OF DISMISSAL AND ABATEMENT

A. These defendants are dismissed:

Security Pacific Corporation

Merrill Lynch, Pierce, Fenner & Smith, Inc

Security Pacific Brokers, Inc.

Financial Clearing and Services Corp.

Securities Industry Association, Inc.

B. The judgment in A is final under Rule 54(b).

c. The case is abated for this defendant.

Jenkens & Gilchrist.

Signed on the 31st day of March, 1989, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Date of Entry: May 24, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
vs.	$	CIVIL ACTION
	$	NO. H-88-2848
SECURITY PACIFIC	$	
CORP., et al.,	$	
	$	
Defendants.	$	

ORDER

Carvel Dillard's motion for finding of fact and conclusions of law on the court's order of April 27, 1989 (item 24) is denied.

Signed on May 22, 1989, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Date of Entry: January 31, 1990

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 89-2583
Summary Calendar
CA-H-88-2848

CARVEL DILLARD,

Plaintiff-Appellant,

VERSUS

SECURITY PACIFIC CORP., ET AL,

Defendants-Appellees.

Appeal from the
United States District Court
For the Southern District of Texas
(CA-H-88-2848)
(January 26, 1990)

Before GEE , SMITH and DUHE, Circuit Judges.

DUHE, Circuit Judge.

It is ordered that this matter be and it is hereby REMANDED for the limited purpose of the district court stating the reasons and authority for the entry of its three orders on February 2, 1989, April 19,

1989 and April 27, 1989, after which the matter will be resubmitted to this Court for consideration.

Date of Entry: May 22, 1990

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 89-2583

CARVEL DILLARD,

Plaintiff-Appellant,

VERSUS

SECURITY PACIFIC CORP., ET AL,

Defendants-Appellees.

Appeal from the
United States District Court
For the Southern District of Texas

Before GEE, SMITH and DUHE, Circuit Judges.

PER CURIAM:

The district court entered judgment in this matter on February 2, 1989. Sua sponte, and without stated reasons, the district court entered additional judgments herein on April 19, 1989 and April 27, 1989, which are inconsistent with the judgment entered on February 2, 1989, and

with each other. This court remanded the matter to the district court for the limited purpose of stating its reasons for the judgments and the authority under which they were rendered. Despite the lapse of an appropriate period of time the district court has not acted. Accordingly:

IT IS ORDERED that this Court's order of limited remand is VACATED.

IT IS FURTHER ORDERED that the district court's judgments entered on February 2, 1989, April 19, 1989, and April 27, 1989 are hereby VACATED and this matter is REMANDED to the district court for the entry of judgment.

Date of Entry: July 17, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CARVEL G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
versus	$	CIVIL ACTION
	$	No. H-88-2848
SECURITY PACIFIC	$	
CORP., et al.,	$	
	$	
Defendants.	$	

ORDER OF DISMISSAL AND ABATEMENT

1. These defendants are dismissed:

   A. Security Pacific Corporation;
   B. Security Pacific Brokers, Inc.;
   C. Financial Clearing and Services Corporation; and
   D. Securities Industry Association, Inc.

2. The judgment in 1 is final under Rule 54(b).

3. The case is abated for these defendants:

   A. Jenkens & Gilchrist and
   B. Merrill Lynch, Pierce, Fenner & Smith, Inc.

Signed on July 6, 1990, at Charlottesville, VA.

Lynn N. Hughes
United States District Judge

Date of Entry: July 17, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CARVEL G. DILLARD,	$	
	$	
Plaintiff	$	
	$	
versus	$	CIVIL ACTION
	$	NO. H-88-2848
SECURITY PACIFIC	$	
CORP., et al.,	$	
	$	
Defendants.	$	

OPINION ON DISMISSAL AND ABATEMENT

After a hearing on January 30, 1989, the court entered three successive orders, on January 31, March 31, and April 10, dismissing four of the defendants and abating the case against two of them.

The last order dismissed these defendants and made the dismissals final:

(1) Security Pacific Corporation;
(2) Security Pacific Brokers, Inc.;
(3) Financial Clearing and Services Corporation; and
(4) Securities Industry Association, Inc.

That order also abated the case against these defendants:

(5) Jenkens & Gilchrist; and
(6) Merrill Lynch, Pierce, Fenner & Smith, Inc.

Dillard appealed these orders, and the court of appeals remanded the case for the limited purpose of allowing this court to state its reasons and authority for the entry of the orders. The court of appeals later vacated the orders.

The transcript of the January 30, 1989, hearing was part of the record on appeal. As the court stated in the transcript on pages 25-27, the reasons for the orders are:

1. Security Pacific Corporation, Security Pacific Brokers, Inc., and Financial Clearing and Services Corporation were dismissed because the claims against them were pending in Dillard v. Security Pacific Brokers, Inc. and Financial Clearing an Services Corporation, Civil Action No. 86-325 1, an earlier case filed by Mr. Dillard. Civil Action No. 86-3251 was stayed by Judge Lake on October 27, 1989, pending the decision of the court of appeals in this case.

2. Securities Industry Association, Inc., was dismissed for failure to state a claim against it. The Association could have been a clearinghouse for price fixing

information, but Dillard did not make that allegation. The Association is not a market participant, and Dillard failed to allege facts that it was a conduit for conspiratorial anti-competitive pricing or monopolization. This lack of sufficient factual allegations constitutes failure to state a claim against the Association for antitrust violations.

3. The case against Jenkens & Gilchrist was abated until Judge Lake ruled on Dillard's motion to amend his complaint to add Jenkens & Gilchrist as a party in Civil Action No. 86-3251. On October 27, 1989, Judge Lake stayed No. 86-3251 pending the decision of the court of appeals in this case.

4. The case against Merrill Lynch, Pierce, Fenner & Smith, Inc., was abated until Dillard moves to, and receives a negative ruling on a motion to, amend his complaint in Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Civil Action No. 85-4135, to include the claims asserted here in that case, because it involves related claims against Merrill Lynch. Judge Lake stayed Civil Action No. 85-4135 on September 6, 1989, pending the outcome of arbitration, and ordered the parties to begin arbitration and dismissed the complaint in a final judgment on February 2, 1990.

The transcript of the hearing is complicated. The cases were assigned to the late Judge Sterling, then placed on an

unassigned docket after his death, and then were handled by several judges before Judge Lake received them. While the district court regrets having to amend its order several times, when someone sues numerous parties on several claims in multiple cases, untangling the web of parties and claims to determine which parties and which claims properly belong in which cases often is as confusing as the pleadings.

Signed on July 6, 1990, at Charlottesville, Virginia.

Lynn N. Hughes
United States District Court

Date of Entry: October 11, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CARVEL G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
versus	$	CIVIL ACTION
	$	No. H-88-2848
SECURITY PACIFIC	$	
CORP., et al,	$	
	$	
Defendants.	$	

O R D E R

Dillard's motion to consolidate Civil Action 86-3251 and Civil Action 88-2848 is not before me. The motion to consolidate pends in Civil Action 86-3251 and will be ruled on by Judge Lake.

Signed on October 4, 1990, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Date of Entry: August 2, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
vs.	$	CIVIL ACTION
	$	NO. H-86-3251
SECURITY PACIFIC	$	
CORP., et al.,	$	
	$	
Defendants.	$	

ORDER

The Court ORDERS that the above referenced cause is TRANSFERRED back to the docket of the Honorable Ross Sterling.

Done this 2nd day of August, 1988, at Houston, Texas.

J. DeAnda
United States District Judge

Date of Entry: August 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARVEL G. DILLARD,	$	
	$	
Plaintiff,	$	
	$	
v.	$	NO. H-88-2848
	$	
SECURITY PACIFIC CORP.;	$	
MERRILL LYNCH, PIERCE,	$	
FENNER & SMITH INC.;	$	
SECURITIES INDUSTRY	$	
ASSOCIATION, INC.;	$	
SECURITY PACIFIC	$	
BROKERS, INC; FINANCIAL	$	
CLEARING AND SERVICES	$	
CORPORATION; JENKENS &	$	
GILCHRIST (A	$	
PARTNERSHIP); AND	$	
JENKENS & GILCHRIST	$	
(A PROFESSIONAL CORP.	$	

C. G. DILLARD,	$	
	$	
v.	$	NO. H-85-4135
	$	
	$	
MERRILL LYNCH, PIERCE,	$	
FENNER & SMITH, INC.	$	

NOTICE OF CONSOLIDATED APPEAL

Notice is hereby given that Carvel Gordon Dillard, Plaintiff above named, hereby appeals to the United States District Court of Appeals for the Fifth

Circuit in the aforementioned actions in consolidated appeal.

Plaintiff hereby gives notice of Appeal:

H-88-2848

Of the orders of final dismissal and abatement entered in this action on July 17, 1990 and of the refusal to issue an injunction.

H-85-4135

Of the orders of final dismissal filed February 1 and February 2, 1990 and from the orders confirming dismissal filed August 6, 1990 and of the refusal to issue an injunction and certain other interlocutory decisions.

This filing is intended to give notice of appeal rather than elaborate upon the issues of appeal and a subsequent filing will list the issues. This appeal is made under 28 U.S.C.S. 1292 (A) as well as 28 U.S.C.S. 1291.

Respectfully submitted,

C. Gordon Dillard
903 SW Central
Grants Pass, Oregon 97526
1-503-479-0098
1-503-479-8686

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing: Notice of Consolidated Appeal has been sent by U.S. Certified Mail, Return Receipt Requested to:

Karl S. Stern
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, TX 77002-6760

Steve Stewart
JENKENS GILCHRIST
900 Interfirst Plaza
1100 Louisiana
Houston, TX 77002

Michael S. Goldberg
BAKER & BOTTS
3000 One Shell Plaza
910 Louisiana
Houston, Texas 77002

on this 10th day of August, 1990.

C. Gordon Dillard

FILED
DEC 22 1992

NO. 92-857

IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

CARVEL GORDON DILLARD,
Petitioner,

v.

SECURITY PACIFIC CORPORATION, ET AL.,
Respondents

Petition for Writ of Certiorari to
The United States Court of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KARL S. STERN
Counsel of Record
Vinson & Elkins L.L.P.
2500 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
Telephone: (713) 758-3828

Counsel for Respondent
Merrill, Lynch, Pierce, Fenner & Smith, Inc.

14 pp

QUESTIONS PRESENTED

The following restates the questions listed by petitioner Carvel Dillard that pertain to respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.:

1. Whether a party opposing arbitration establishes a right to a jury trial under section 4 of the Arbitration Act based upon conclusory allegations unsupported by any affidavit or other evidence. (Restatement of Petitioner's Questions 1 and 2.)

2. Whether a party is entitled to declaratory and permanent injunctive relief when he has not made a claim for such relief in his complaint. (Restatement of Petitioner's Question 3.)

3. Whether findings of fact and conclusions of law are required under circumstances not covered by FED. R. CIV. P. 52(a). (Restatement of Petitioner's Question 4.)

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NO. 92-857

IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

CARVEL GORDON DILLARD,
Petitioner,

v.

SECURITY PACIFIC CORPORATION, ET AL.,
Respondents

Petition for Writ of Certiorari to
The United States Court of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

The statute primarily involved in this case is section four of the Federal Arbitration Act, 9 U.S.C. § 4 (1988), which provides as follows:

> § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order

to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may

> specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

STATEMENT OF THE CASE[1]

The Fifth Circuit decision from which petitioner Carvel Dillard ("Dillard") seeks relief is in a consolidated appeal in three separate suits brought by Dillard--Cause No. H-85-4135 (the "1985 Case"), Cause No. H-86-3251 (the "1986 Case"), and Cause No. H-88-2848 (the "1988 Case"). Respondent Merrill Lynch, Pierce, Fenner & Smith, Incorporated[2] ("Merrill Lynch") was a party only to the 1985 Case and the 1988 Case. Accordingly, Merrill Lynch will not address the issues Dillard purports to raise with respect to the 1986 Case.

---

[1] To the extent Dillard contends that any facts were established in the underlying proceedings, he is incorrect. Moreover, the Fifth Circuit's description of the proceedings in this matter are sufficient and correct, and respondent takes issue with the many statements by Dillard in his petition that contradict or go beyond the Fifth Circuit's description.

[2] Respondent Merrill Lynch, Pierce, Fenner & Smith, Incorporated is a subsidiary of Merrill Lynch & Co., a publicly traded corporation. Merrill Lynch, Pierce, Fenner & Smith, Incorporated has the following subsidiaries that are not wholly owned: Merrill Lynch Life Agency Inc. (Ohio), Merrill Lynch Life Agency Inc. (Oklahoma), Merrill Lynch Life Agency Ltd. (Mississippi), Merrill Lynch-Nomura Management Company, Inc., ML Life Agency, Inc., Wagner Stott Clearing Corp.

A. The 1985 Case

Dillard filed the 1985 case against Merrill Lynch claiming that Merrill Lynch had somehow acted improperly in liquidating a securities trading account Dillard held at Merrill Lynch. Based on arbitration clauses in Dillard's customer agreements with Merrill Lynch, Merrill Lynch moved to compel arbitration of Dillard's claims.

Dillard opposed the motion to compel arbitration and filed his own motion seeking a declaration that the arbitration clauses at issue were invalid adhesion contracts and seeking a permanent injunction against Merrill Lynch's enforcement of the clauses. In his motion, Dillard argued that the clauses were included in Merrill Lynch's customer agreements pursuant to an antitrust conspiracy with other securities brokers. Dillard also requested a jury trial under section 4 of the Federal Arbitration Act on the enforceability of the arbitration contracts; however, he did not submit any affidavits or any other evidence in support of his opposition to arbitration.

Concluding that "[n]o claim has been made in plaintiff's Complaint or First Amended Complaint that creates any question of law, equity or fact that cannot be arbitrated," the trial court granted Merrill Lynch's motion to compel arbitration. (Petitioner's Appendix ["App."] at 89.) In addition, the trial court denied Dillard's request for declaratory and permanent injunctive relief because the motion was "beyond the scope of [Dillard's] pleadings." (App. at 89.) The court then dismissed the case without prejudice. (App. at 90.)

A January 4, 1991, arbitration resulted in a take-nothing award against Dillard.

The Fifth Circuit affirmed the trial court's orders. The Fifth Circuit held that Dillard was required to show that his allegations, if true, were legally sufficient to relieve him of his obligation to submit to arbitration and to produce at least some evidence to substantiate those factual allegations. (App. at 20.) The court concluded that Dillard had not satisfied this burden because, *inter alia*, Dillard failed to adduce any evidence that the contract was somehow unfair or oppressive in this case. (App. at 22.)

In addition, the Fifth Circuit held that Dillard could not obtain declaratory or permanent injunctive relief without making the request in his pleadings in accordance with Fed. R. Civ. P. 8(a). (App. at 25.) Moreover, the Fifth Circuit concluded that the trial court's refusal to enter finding of fact and conclusions of law was not error as neither of the circumstances in which such findings are made under Fed. R. Civ. P. 52(a) was present: a trial upon the facts without a jury or a ruling on an interlocutory, as opposed to permanent, injunction. (App. at 25.)

B. The 1988 Case

Dillard sued all respondents, including Merrill Lynch, in the 1988 case. Dillard alleged antitrust violations against Merrill Lynch, Security Pacific Corp. ("Security Pacific"), and Securities Industry Association, Inc. He also asserted RICO, Hobbs Act, and common law claims against Merrill Lynch, Security Pacific, and Jenkens & Gilchrist. Finally, Dillard asserted claims against Merrill Lynch based on the same securities transactions at issue in the 1985 Case.

The district court abated Dillard's claims against Merrill Lynch in the 1988 Case until such time as Dillard attempted and failed to add those claims to the 1985 Case by amending his complaint in that case.

(App. at 311.) The Fifth Circuit concluded that various efforts by Dillard to amend the judgment in the 1985 Case and to add Merrill Lynch to the 1986 case were sufficient to satisfy the terms of the abatement. (App. at 44.) As the result, the Fifth Circuit remanded the 1988 Case as to Merrill Lynch for prosecution on the merits.

REASONS FOR DENYING THE WRIT

None of the questions Dillard raises in his petition merit the Court's review. Dillard does not suggest any conflict between the principles applied by the Fifth Circuit and any decision of the Court or any of the circuits. *See* Sup. Ct. Rule 10.1. Moreover, the Fifth Circuit's decision is correct.

First, the Fifth Circuit properly concluded that Dillard was not entitled to a jury trial on the enforceability of the arbitration clauses. Although section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides for a jury trial on the enforceability of any agreement to arbitrate, the party opposing arbitration is not entitled to a jury trial simply by demanding one. *Saturday Evening Post Co. v. Rumbleseat Press*, 816 F.2d 1191, 1196 (7th Cir. 1987). The enforceability of the agreement must "be in issue." 9 U.S.C. § 4. To put enforceability in issue, the Fifth Circuit held that Dillard "must make some showing that under prevailing law, he would be relieved of his contractual obligation to arbitrate if his allegations proved to be true. In addition, he must produce at least some evidence to substantiate his factual allegations." (App. at 19-21.)

The Fifth Circuit was correct in requiring Dillard to satisfy this burden in order to obtain a jury trial under section 4. The burden imposed by the Fifth Circuit is consistent with other decisions touching on the issue. *See, e.g., Chastain v. Robinson-Humphrey Co.*, 957 F.2d

851, 855 (11th Cir. 1992) ("party must substantiate the denial of the contract to arbitrate with enough evidence to make the denial colorable"); *T & R Enters. v. Continental Grain Co.*, 613 F.2d 1272, 1278 (5th Cir. 1980) (requiring some evidence to substantiate denial that arbitration agreement had been made); *Almacenes Fernandez, S.A. v. Golodetz*, 148 F.2d 625, 628 (2d Cir. 1945) ("[t]o make a genuine issue entitling the plaintiff to a trial by jury, an unequivocal denial that the agreement had been made was needed, and some evidence should have been produced to substantiate the denial").

The burden imposed under these authorities promotes important objectives of the Federal Arbitration Act. "It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration. . . ." H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (quoted in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985)). These objectives will be thwarted if the costs and delays associated with a jury trial on collateral issues can be imposed on the arbitration process with the kind of general and conclusory allegations, unsupported by affidavits or other evidence, that Dillard made in this case. Such a disruption of the arbitration process should be permitted only when the opposing party can point to specific facts that would defeat arbitration and supports those facts with some evidence.

Moreover, Dillard's argument that arbitration agreements such as the ones at issue are contracts of adhesion has been rejected consistently by the courts. Adhesive contractual terms are not void per se. Rather, the party attacking them must show that they are unconscionable. *See* 6A Arthur L. Corbin, CORBIN ON CONTRACTS § 1376 at 20-21

(1962). In essence, allegedly adhesive arbitration clauses are subject to the same attacks as any other arbitration agreement or choice of forum clause. *See, e.g. Adams v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 888 F.2d 696, 700-01 (10th Cir. 1989). There must be some factual showing that the arbitration clause was oppressive, unreasonable, unjust, or inconvenient, or that the clause was induced by fraud, undue influence, or overweening bargaining power. *Cf. The Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 12, 15, 18 (1972). Here, the Fifth Circuit joined other circuits in holding that agreements to arbitrate in the securities industry are not unconscionable as a matter of law. (App. at 22.); *ee, e.g., Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988). Therefore, Dillard could not avoid arbitration; he failed to show that the arbitration clauses were unfair or oppressive under the facts of this case. (App. at 22.)

The Fifth Circuit was also correct in affirming the district court's disposition of Dillard's motion for declaratory and permanent injunctive relief. Requests for such relief must be made in a plaintiff's complaint. Fed. R. Civ. P 8(a). Because Dillard did not assert such causes of action in his complaint, he could not assert them for the first time in a motion. Thus, the court properly denied the relief Dillard requested in the motion.

Dillard's complaint about the district court's refusal to issue findings of fact and conclusions of law in the 1985 case is also without merit. Because there was no motion for an interlocutory injunction or non-jury trial on the facts, Fed. R. Civ. P. 52(a) simply does not apply.

Dillard's complaint in the 1985 Case about the availability of a private right of action under section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1988), is a non-issue. The district court dismissed the

1985 Case without prejudice and sent all claims to arbitration. The district court did not rule on the existence of a section 17(a) cause of action. The viability of a private right of action under section 17(a) is simply not at issue in this case.

As to the 1988 case, Merrill Lynch cannot discern what Dillard is complaining about. Because the Fifth Circuit remanded the 1988 Case to be adjudicated on the merits, Dillard won the appeal of that case as to Merrill Lynch and may proceed to litigate the case in the trial court.

To the extent Dillard complains of the factual recitation in the Fifth Circuit opinion, he does not specify what he claims is factually incorrect. In any event, the statement of facts in the Fifth Circuit's opinion is supported by the record, and it is certainly not the task of the Court to edit appellate opinions. *See Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court, however, reviews judgments, not statements in opinions").[3]

CONCLUSION

Dillard's petition for writ of certiorari should be denied.

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[3] The petition should also be denied because it was not timely filed. The Fifth Circuit's opinion in this case was issued on May 15, 1992. On August 13, 1992, the last day of the ninety day period for filing, the Clerk of this Court rejected a petition filed by Dillard because it was in improper form and the appendix was incomplete. More than three months later, sometime after November 14, 1992, Dillard filed a revised petition. Merrill Lynch submits that the revised version was not a "promptly substituted" revision allowed by Rule 33.7.

Respectfully submitted,

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